

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF HAWAII

3))
4 UNITED STATES OF AMERICA,) CR 14-00826 SOM
5))
6 Plaintiff,) Honolulu, Hawaii
7))
8 vs.) July 2, 2015
) 9:00 A.M.
9 ALBERT S. N. HEE,)
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10 Defendant.)
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9 TRANSCRIPT OF JURY TRIAL (DAY 7)
10 BEFORE THE HONORABLE SUSAN OKI MOLLWAY
11 UNITED STATES DISTRICT JUDGE

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1 THURSDAY, JULY 2, 2015 9:10 O'CLOCK A.M.

2 THE CLERK: Criminal 14-826 SOM, United States of
3 America versus Albert Hee. This case has been called for
4 Further Jury Trial.

5 Counsel, please make your appearances for the record.

6 MR. TONG: Good morning, Your Honor. Good morning,
7 ladies and gentlemen. Larry Tong and Quinn Harrington for the
8 United States. With us are Christina Sorely and Special Agent
9 Greg Miki. Good morning.

10 MR. TOSCHER: Good morning, Your Honor. Good
11 morning, ladies and gentlemen. Steven Toscher for Defendant
12 Albert Hee, who is present with me in court, together with
13 Lacey Strachan. And Mr. Kawafuchi is probably checking on the
14 witness.

15 THE COURT: Okay. Good morning. You can be seated.
16 Welcome back.

17 I am turning back to Mr. Toscher. Who will the next
18 witness be?

19 MR. TOSCHER: Miss Lynn Tamanaha. Your Honor, just
20 to let you know, she was a witness earlier.

21 THE COURT: Yes. So she's still under oath.

22 So you folks already have a sticker with
23 Miss Tamanaha's picture; so we're not going to take her picture
24 again.

25 Come on up. Good morning. So you are still under

1 oath as you were before.

2 Okay. So this is a witness you've seen before: Lynn
3 Tamanaha.

4 Counsel, go ahead.

5 DIRECT EXAMINATION

6 BY MR. TOSCHER:

7 Q May it please the Court. Ladies and gentlemen.

8 Good morning, Miss Tamanaha.

9 A Good morning.

10 Q Miss Tamanaha, you testified before, and I had the chance
11 to question you as well as Mr. Tong. Just to refresh the
12 recollection of the jurors, you were an accountant during the
13 period 2000 through 2012 with Chinaka & Siu?

14 A 8 -- oh, as an accountant? Yes.

15 Q Yes. And you are a certified public accountant?

16 A Yes.

17 Q And one of your primary responsibilities there was the
18 preparation of the -- or the preparation of the Waimana
19 corporate tax returns.

20 A Yes.

21 Q And was it your procedure as you received information, if
22 questions came about, to request additional information from
23 Waimana?

24 A Yes.

25 Q Now, previously, you had testified that you asked

1 Miss Henderson what the payments to Diane Doll were, and you
2 testified she told you they were for health consulting; is that
3 correct?

4 A Yes, correct.

5 Q I'd like to ask you to look at Exhibit 50-4 in your book
6 there.

7 A Okay.

8 Q Would you look at that. And do you recognize this as a
9 memo you received from Nancy Henderson on or about
10 January 20th, 2003?

11 A Yes.

12 Q And did you receive these types of information from the
13 client in the ordinary course of your business of preparing the
14 returns?

15 A Yes.

16 Q Now, if you go down and look at -- and you recall
17 receiving this from Miss Henderson; is that correct?

18 A Yes.

19 MR. TOSCHER: Your Honor, I would offer 50-4 into
20 evidence.

21 MR. HARRINGTON: Your Honor, I object on hearsay
22 grounds, and also this is cumulative of her earlier
23 testimony.

24 MR. TOSCHER: It's not hearsay, Your Honor. It's a
25 business record offered for the truth -- I mean, offered for

1 the fact that it was sent to her. And Mr. Harrington is right
2 it's been testified to, but we would like to have a document in
3 the record.

4 THE COURT: Objection's overruled. I'm receiving
5 50-4.

6 BY MR. TOSCHER:

7 Q Miss Tamanaha, this is 50-4 that you have in front of you.
8 Would you look -- focus on it says: "Hi, Lynn. Here's the
9 information requested."

10 Thank you. I apologize.

11 "Here is the information requested." And number 3,
12 she is telling you payments to Diane Doll are for health
13 consultant services; is that correct?

14 A Yes.

15 MR. TOSCHER: I have no further questions, Your
16 Honor.

17 THE COURT: Okay. Mr. Harrington, do you have any
18 cross-examination?

19 MR. HARRINGTON: I do.

20 CROSS-EXAMINATION

21 BY MR. HARRINGTON:

22 Q Good morning, Miss Tamanaha.

23 A Good morning.

24 Q I hope you had a more relaxing weekend than all of us did.

25 Let me just touch on a few quick points here. You

1 were shown a document. And, actually, if we could get that
2 document back on the screen.

3 And now you testified before that you didn't know
4 that Diane Doll was a personal massage --

5 A Correct.

6 Q -- services; right?

7 A Yes.

8 THE COURT: Counsel, you can make that bigger by
9 adjusting the height of the light.

10 MR. HARRINGTON: Thank you.

11 THE COURT: There's a -- this Elmo, yeah.

12 MR. HARRINGTON: There we go. Thank you.

13 THE COURT: You might -- because people get kind of
14 seasick when it's crooked. Mr. Tong, can you straighten that
15 out?

16 Thank you very much. Thank you.

17 MR. TONG: Is that big enough?

18 BY MR. HARRINGTON:

19 Q And so also just so the jury remembers, you stopped
20 working on the Waimana corporate returns in 2008; is that
21 right?

22 A Yes.

23 Q And then you found out what Diane Doll's services were as
24 a personal masseuse in 2011.

25 A Yes.

1 Q And you found out from the IRS?

2 A Yes.

3 Q Okay. And if we look at this document here, it says
4 payments to Diane Doll are for health consultant.

5 A Uh-huh.

6 Q But it doesn't say for massage purposes.

7 A Yes.

8 Q And it doesn't say for Albert Hee either, does it.

9 A No, it doesn't.

10 MR. HARRINGTON: I don't have any further
11 questions.

12 THE COURT: Okay.

13 RE-DIRECT EXAMINATION

14 BY MR. TOSCHER:

15 Q Just briefly, Miss Tamanaha. The -- when you were told
16 they were for health consulting services, you didn't raise that
17 to the partner level with Mr. Siu, did you.

18 A I didn't tell him.

19 Q You didn't raise it to -- when you saw health consulting
20 services, you didn't think it was an issue that you needed to
21 raise with the partners?

22 A Yes, that's correct.

23 Q And you didn't raise it with them, did you.

24 A No, I didn't.

25 MR. TOSCHER: No further questions, Your Honor.

1 MR. HARRINGTON: Nothing further.

2 THE COURT: Then the witness is excused. You can
3 leave the courtroom. Thank you.

4 (Witness excused.)

5 MR. TOSCHER: Your Honor, the defense calls Mr. Gary
6 Howard.

7 THE COURT: Okay.

8 MR. TOSCHER: Your Honor, we have -- Mr. Howard is
9 an -- I have some notebooks for counsel, the Court, and the
10 jury. Can I start handing those out?

11 THE COURT: Have you seen these, counsel?

12 MR. HARRINGTON: We have not seen them, Your Honor.

13 THE COURT: Show it to them and make sure this is
14 okay, I think the same as when you were wanting to check the
15 schedules before they were passed out.

16 In the meantime, why doesn't the witness come up so
17 we can at least take the photograph while you're taking care of
18 that.

19 MR. TOSCHER: Your Honor, I'll pass these up. Here's
20 the Court's copy.

21 THE COURT: My law clerk can help you with this.

22 MR. TOSCHER: I think the witness has a copy, Your
23 Honor.

24 THE COURT: This is mine.

25 MR. TOSCHER: That's for you, yes, Your Honor.

1 Your Honor we have copies of the small notebook for
2 the jurors to Mr. -- once the government looks at them.

3 THE COURT: Okay. So let's -- yeah, let's swear him
4 in.

5 (Witness photographed.)

6 THE CLERK: Please raise your right hand.

7 (Witness sworn.)

8 THE CLERK: Thank you. Please be seated.

9 Please state your name and spell your last name.

10 THE WITNESS: Gary L. Howard, H-o-w-a-r-d.

11 THE COURT: I think there might be a little
12 questioning before we get to this.

13 Okay. Go ahead.

14 DIRECT EXAMINATION

15 BY MR. TOSCHER:

16 Q May it please the Court. Ladies and gentlemen.

17 Good morning, Mr. Howard.

18 A Good morning.

19 Q Will you please state your business address for the
20 record.

21 A My business address is 10417 Los Alamitos Boulevard, Los
22 Alamitos, California 90720.

23 Q And what is your occupation?

24 A I am a certified public accountant.

25 Q And how long have you practiced as a certified public

1 accountant?

2 A I have practiced as a certified public accountant since
3 1981.

4 Q Okay. And who are you certified by as a certified public
5 accountant?

6 A I am licensed by the State of California and also the
7 State of Nevada.

8 Q And tell us briefly -- well, before you were certified,
9 tell us a little bit about your educational experience.

10 A I have my Bachelor's of -- I have my Bachelor of Arts,
11 major in accounting and economics from Cal State Fullerton, and
12 I have a master's in taxation from Golden Gate University.

13 Q I don't think we've -- the jury has heard some testimony
14 regarding you're -- about undergraduate degrees in accounting.
15 Tell us about your course -- what kind of courses did you have
16 to take to get your undergraduate degree in accounting?

17 A In undergraduate accounting you're required a minimum of
18 24 semester hours of accounting to obtain a degree. In order
19 to become a certified public accountant, you must -- for the
20 State of California -- work a minimum of two years for another
21 certified public accountant that certifies that you have been
22 trained by that professional, plus pass a lengthy examination.

23 Q Okay. And you've been certified. I assume you took the
24 examination?

25 A I did take the examination, and I was certified in 1984.

1 Q Okay. And you obtained the practical experience which
2 also was a component to be certified?

3 A Yes.

4 Q Let me ask you a little bit about you mentioned a master's
5 degree in taxation. Explain that to the jury.

6 A I obtained an additional degree. After practicing for
7 approximately 10 years in the field of public accounting I
8 continued my education and received a degree from Golden Gate
9 University in taxation, which is a master's program
10 specifically studying the areas of tax, both individual,
11 corporate, and other business entities.

12 Q Okay. Can you tell us a bit about your professional
13 experience after you left college in the accounting field.

14 A Yes. I worked for two firms. One firm was a small
15 practitioner in the Southern California area, specifically Long
16 Beach. That individual specialized not only in taxation but
17 also in the accounting and auditing of closely-held
18 corporations, meaning a few number of shareholders and
19 controlled by either a family or a specific shareholder.

20 Then the -- subsequent to working for the firm in
21 Long Beach, which was titled The Accounting Firm of Clement W.
22 Morin, I went to work in Los Angeles for a firm that was
23 approximately 24 to 30 people, five partners. And they were --
24 their name was Levine, Cooper, Spiegel & Company, and they
25 specialized also in closely-held corporations, shareholders,

1 tax prep, estate planning, a full-service accounting firm.

2 Q When you said "tax prep," you meant preparation of tax
3 returns?

4 A Yes, tax preparation.

5 Q You mentioned closely-held corporation. What is a
6 closely-held corporation?

7 A What makes a closely-held corporation unique, and it's
8 referred to many times in our industry, there is what's called
9 the basis of accounting, which is Generally Accepted Accounting
10 Principles. There is a common term used that refers to Big
11 GAAP and Little GAAP. Big GAAP meaning still it's generally
12 accepted accounting principles, but those are the accounting
13 principles that apply to very, very large corporations, such as
14 GM, Exxon, et cetera.

15 Under the same umbrella there is generally accepted
16 accounting principles that apply to both types of businesses
17 but are more common to smaller businesses. Smaller business is
18 defined as businesses that are owned by a specific shareholder,
19 a family, or a small group of individuals, related or
20 unrelated, that control and run the daily operations of a
21 business. My experience has been primarily with what's called
22 Little GAAP or closely-held corporations with limited number of
23 shareholders.

24 Q Okay. Do you have your own certified public accounting
25 firm now?

1 A Yes. I started my own practice in May of 1986 by the name
2 of G.L. Howard, specifically my name. Approximately, two years
3 ago I added a partner to my firm. Now we are G.L. Howard &
4 Company. We are approximately eight accountants and one
5 administrative staff at this time.

6 Q Okay. Could you tell us the type of work your company --
7 what you have engaged in since you formed the company, the type
8 of work you guys do.

9 A It varies, but still we're relying on the roots where I
10 learned the specialty I have of dealing with closely-held
11 companies. We take care of approximately 60 to 85 corporations
12 with revenues of anywhere from two to a hundred million
13 dollars, employees working for those companies, anywhere from
14 five to 200 employees. That's our primarily what we call our
15 general practice.

16 We also assist taxpayers in the area of
17 representation when their corporation or them themselves
18 individually are selected for audit by the Internal Revenue
19 Service or a state or local authority. We assist them in
20 representing them, accumulating documents, presenting those
21 documents, and ultimately coming to a result and settlement of
22 the issue at hand.

23 Q You mentioned tax preparation. How many -- you mentioned
24 a number of closely-held corporations. How many tax returns
25 does your firm prepare a year?

1 A We do approximately 450 to 500 individual tax returns.

2 Q And that's a Form 1040?

3 A Form 1040, yes.

4 Q And how many business returns?

5 A Approximately, 65 to 85, which I would call substantial
6 corporation corporations that have business activities and have
7 revenues, employees, and definite trades or businesses that the
8 actual entity is performing.

9 Q Okay. In addition to tax preparation, do you do any tax
10 planning services?

11 A That is a standard area. In today's environment it is
12 more likely than not as a CPA that you will not only be asked
13 to prepare returns but, more importantly, to assist the
14 taxpayer in determining proper tax strategies in order for them
15 to minimize their taxes and only pay what is the legally
16 minimum that they should be responsible for.

17 Q Okay. In addition to the tax services, what type of
18 accounting services does your company render?

19 A We render all major forms of accounting services. We do
20 perform certified financial audits. Although, lately the
21 standards have been changing, they're very labor-intensive type
22 engagements, and so we don't perform as many audits as we used
23 to. Although, we prepare what's called reviews, which,
24 basically, have the -- some of the standards similar to an
25 audit in preparing a financial statement.

1 We also assist taxpayers with compilations, which
2 from an accounting term is assisting the taxpayer of
3 accumulating their financial data, making sure that data is
4 posted correctly to their books and records, and ultimately
5 preparing a financial statement that can be used not only
6 internally, but for third parties.

7 And then a major part of our practice has grown
8 probably over the last 15 years. We do a lot of forensic
9 accounting work where we --

10 Q Explain what forensic accounting work is.

11 A Forensic accounting work is reviewing transactions, what
12 we call drilling down. "Drilling down" means reviewing
13 transactions, not only from the final payment via a check, but
14 actually looking at the supporting documentation, looking at
15 the flow of the information, determining that not only if the
16 flow or the information is being reported correctly, that
17 there's no improprieties in that information. A forensic
18 engagement is an engagement where you're asked for a specific
19 or a specific purpose to look at something to see, for all
20 intents and purposes, that the transactions are being handled
21 correctly and there is not a problem.

22 Q Do you have any experience teaching accounting?

23 A Yes. I'm currently a part-time professor at Cal State
24 Fullerton. I am their forensic accounting instructor. That is
25 a course not only in forensic accounting, it is a course that

1 is required by senior accounting students at the university if
2 they do not choose to go into the auditing field.

3 So I've been teaching for approximately a year, two
4 semesters, there. I will be teaching again in the fall. I
5 feel privileged to be able not only to teach at my alma mater,
6 but it keeps me very current in the forensic area and the
7 changes and different techniques that are used to analyze
8 transactions.

9 Q You mentioned before you had a master's degree in
10 taxation. What type of -- I don't think I asked you. What
11 type of courses did you have to take and how many courses to
12 get that?

13 A There was 10 courses, three semester hours, so
14 approximately 45 hours of study in each course or 450 hours of
15 required classroom and study for an entire degree. The classes
16 in the taxation area dealt with -- start the individual
17 taxation, also the study of tax, how it applies to
18 corporations, how tax applies to corporation and their
19 shareholders, the basis of tax law, meaning the research that's
20 necessary and the foundation that is necessary in order to
21 analyze a transaction and make a good-faith determination on
22 its deductibility.

23 Q Where are your clients located, your present practice?

24 A My present practice I have clients recently all over the
25 country now, with the advent of our computers and our

1 telecommunication systems are so much different. But my
2 practice is primarily in the State of California. I do have
3 clients here in the State of Hawai'i and a few clients in the
4 State of Nevada.

5 Q Have you ever been qualified as an expert in court?

6 A Yes.

7 Q Have you been qualified in a number of different courts?

8 A Yes. I've been qualified in -- not only federal court,
9 but district -- Superior Court or California state court.
10 That's where my primary experience comes from.

11 Q Where have you been qualified in the federal District
12 Court? What federal District Courts?

13 A I've been qualified in the Los Angeles federal court and
14 also here in the State of Hawai'i in this court.

15 Q Okay. And you were qualified as an expert in tax matters
16 and tax accounting matters?

17 A Yes.

18 MR. TOSCHER: Your Honor, we would offer Mr. Howard
19 as an expert.

20 MR. HARRINGTON: In what?

21 THE COURT: In the fields of --

22 MR. TOSCHER: As an expert in the field of tax and
23 tax accounting matters.

24 MR. HARRINGTON: No objection.

25 THE COURT: Okay. Then he can give his opinions in

1 those fields.

2 MR. TOSCHER: Your Honor, we would like to hand out
3 the demonstrative exhibits.

4 MR. HARRINGTON: Your Honor, we've been given a lot
5 here. I think we'd like a little bit of time to review it.

6 THE COURT: Okay.

7 MR. HARRINGTON: And so --

8 THE COURT: Even though we've just begun --

9 MR. HARRINGTON: I understand. This is the first
10 time we've seen any of these --

11 THE COURT: Yes. No, I know. Are there other things
12 you can talk about before you get into those exhibits, or are
13 those exhibits --

14 MR. TOSCHER: I think they're key to the overall
15 testimony.

16 THE COURT: Okay. We're going to take a little
17 break. Don't go far because we'll resume as soon as we can,
18 okay?

19 (Jury excused.)

20 THE COURT: Okay. I hope it won't be a long break,
21 but let the courtroom manager know. Okay?

22 So we're off the record.

23 (Court recessed at 9:40 A.M., until 10:25 A.M.)

24 THE COURT: Okay. I just wanted to ask both sides, I
25 know that, you know, you're probably not getting much sleep and

1 you're working late at night. I need you, like, to get an hour
2 less sleep on both sides.

3 So I totally understand that, when you're making
4 these big exhibits for your summary or expert witnesses, that
5 you're reacting to late-breaking events in the trial; so you
6 didn't have everything you needed, either side, to do these
7 things, you know, a week earlier. Do them an hour earlier.
8 Give it to the other side by eight o'clock in the morning on
9 the day the witness is coming in so we don't have to delay in
10 front of the jury. So instead of either side giving these
11 dense exhibits as the witness takes the stand, exchange it at
12 8:00 in the morning so that, before the jury's here, people can
13 look it over. That's what I'm asking.

14 So I know you're up till 3:30, now you got to stay up
15 till 4:30 in the morning so you give that hour earlier thing.
16 Both of you. Please. So they don't have to wait.

17 Okay. Let's call the jurors.

18 MR. TOSCHER: Your Honor, before they get here, I've
19 talked to Mr. Harrington regarding the books for the jurors,
20 and for the small book -- that's the only one we're passing
21 out -- they have no objection. So do we want to wait for --

22 THE COURT: Okay. That's okay?

23 MR. HARRINGTON: There's no objection to passing it
24 out.

25 THE COURT: Okay. Then why don't we just stick them

1 on their chairs.

2 MR. TOSCHER: Okay. That's what I'm asking.

3 (Jury enters.)

4 THE COURT: Thank you to the jurors for their
5 patience. Things have worked out so you have binders, and
6 we'll let you know when to open those binders and what to look
7 at in the binders. Okay?

8 Mr. Toscher, you can proceed.

9 MR. TOSCHER: May it please the Court. Ladies and
10 gentlemen.

11 Q Mr. Howard, do you have a small binder in front of you?

12 A Yes, I do.

13 Q This. Could you briefly -- the first page is a Table of
14 Contents. Would you just please describe what the Table Of
15 Contents is. And maybe the jurors can turn to the Table of
16 Contents so they have reference.

17 THE COURT: Okay. It's really exciting, this Table
18 of Contents. Go ahead and open the first page.

19 THE WITNESS: All right. On the upper, left-hand
20 corner lists an exhibit number. The exhibit number is then
21 followed by a page number, which is the page number of the
22 descriptions, of the particular information that I will be
23 presenting to the Court as part of my analysis for the
24 foundation of the opinions that I'm going to present.

25 BY MR. TOSCHER:

1 Q Okay. Thank you. Because we are going to be referring to
2 page numbers.

3 So the first page I would like you to turn to is page
4 18 dealing with the --

5 THE COURT: Okay. So the jurors should wait. Okay.
6 You're only asking the witness to turn to page 18.

7 MR. TOSCHER: That's correct. I'm sorry, Your Honor.

8 Q Mr. Howard, could you just tell us -- I asked you to
9 undertake a forensic accounting investigation regarding the
10 classification of the 2004 tuition expense; is that correct?

11 A That's correct.

12 Q Okay. Would you tell us what page 18 reflects, and then
13 we'll ask the Court to allow it to be published.

14 A Page 18 is a flow chart illustrating my analysis of the
15 information that I reviewed and my conclusions that I
16 determined regarding the tuition expense and the error that was
17 made in deducting that expense.

18 MR. TOSCHER: Okay. Your Honor, at this time I would
19 ask the jurors to be able to turn to page 18 of the book.

20 THE COURT: Any problem?

21 MR. HARRINGTON: No objection.

22 THE COURT: All right. Jurors, you can go ahead.
23 And at the bottom of the page you'll see it says page such and
24 such of 50; so you need to find the place that says page 18,
25 which has blue and green geometric shapes on it.

1 And once again you are not going to have these
2 binders in the deliberation room. So if you are taking notes
3 to help you remember things, you need to put them into those
4 spiral notebooks. Don't write your notes on the things in the
5 three-ring binders because then your notes won't be with you.
6 Okay?

7 BY MR. TOSCHER:

8 Q Mr. Howard, before -- why don't you first describe what is
9 reflected on page 18.

10 A Page 18 is a flow chart that analyzes the checks that were
11 written to MIT and their classification in the internal records
12 of Waimana Enterprises, their subsequent re-entry or
13 reproduction in the creation of the corporation's general
14 ledger by the -- by Waimana's independent certified public
15 accountants. From that information, the information that was
16 entered, the analysis that was done with that information,
17 reflecting in a preparation of a financial statement and a
18 deduction on the 2004 Waimana tax return.

19 Q Okay. So we have a number of pages. Let's -- the first
20 blue circle: checks written payable to MIT. Is there a page
21 number that we can refer the jurors to with the court's
22 permission after you describe it, and what page is that?

23 A Yes, sir. It would be page 19.

24 MR. TOSCHER: And, Your Honor, can we have the jurors
25 go to page --

1 THE COURT: Let me just check. Mr. Harrington, are
2 you going to have any problem with the jurors referring to
3 anything in this notebook as the witness refers to those pages?

4 MR. HARRINGTON: No, Your Honor.

5 THE COURT: Okay. Then when he asks the witness to
6 look at it, you can look at it, too. Okay? So page 19 is what
7 the witness is now looking at.

8 BY MR. TOSCHER:

9 Q Mr. Howard, what does page 19 reflect?

10 A It is a recap of the college tuition payments for the year
11 2004 that were written and dispersed by Waimana Enterprises to
12 the Massachusetts Institute of Technology.

13 Q Okay. And that recap, can you explain where in these --
14 what it is based upon and where you get that information? I
15 believe pages 20, and you can maybe walk the jurors through
16 that, how we come up with those numbers.

17 A Yes, yes. On this recap the first column is work paper
18 reference. That's our internal -- or my office's internal
19 referencing of the data. The date is the date. For instance,
20 the first date is 7/27/04. That would represent the date that
21 the check was written. Check number's the specific check
22 number. The amount is the amount. And name is the name that
23 was reflected in the books and records of Waimana. And the
24 memo for this column to the right is the specific description
25 that is reflective in the books and records of Waimana.

1 Q When you're referring to the books and records of Waimana,
2 are you referring to the Quicken or QuickBooks?

3 A Yes. If the Court could turn to page 20.

4 THE COURT: Go ahead.

5 THE WITNESS: Page 20 at the top indicates that
6 the -- at the top says Waimana. It says General Ledger. And
7 it says as of December 31, 2004. That would reflect the
8 transactions for the entire calendar year beginning January 1
9 of 2004 and concluding on December 31, 2004.

10 If you look at the -- close to the middle of the
11 page, you should see a highlighted amount. It says check
12 7/27/04, check 4081, MIT, amount \$15,400. If you look at that,
13 that is the information that I used in order to review and
14 recap the amount of payments that were paid to MIT as tuition
15 expense. If we --

16 Q Let me just interrupt you one second. The -- to take you
17 through pages 21, 22, and 23, that is what you're referring to
18 as --

19 A Yes.

20 Q -- the backup for your summary schedule.

21 A That is correct.

22 Q And these pages, if you go to page 20 of 50, just so we're
23 clear, this is an excerpt of the Waimana Quicken or QuickBooks.
24 It says General Ledger. This is excerpted from Government
25 Exhibit 4-1?

1 A That is correct.

2 Q And in looking at the first page, page 20 of 50, how is
3 the -- how is the payment to MIT categorized?

4 A It's categorized, if we look at the sixth column, so type,
5 date, number, name, memo, and then what is the term split,
6 which "split" is a term that is characteristic of the
7 QuickBooks accounting program. It means, specifically, that
8 the expenses may be split between two or three different
9 categories.

10 In this case, if we look at the check dated 7/27/2004
11 that's highlighted, we will see under the word "split" -- or
12 I'm sorry, the sixth column you will see a classification
13 indicating WEI.

14 Q Do you know what that refers to?

15 A Just the pronunciation. It means WEI.

16 Q But it stands for the company?

17 A Yes.

18 Q Which company?

19 A Waimana.

20 Q So on the Quicken the only characterization of this is
21 either describing that it's a payment for tuition and that it
22 relates to Waimana; is that correct?

23 A That's correct. And this -- so the Court understands,
24 this would be a characteristic that is not familiar to -- is
25 not common to a general ledger. General ledger is specifically

1 an accumulation of the income and expenses classified by a
2 specific type of income and expense. This I would describe, if
3 I could describe it, to a person that is not an accountant, I
4 would say this is similar to what would be a check register,
5 something you would keep in your checkbook in your wallet, a
6 checkbook in your purse or your checkbook. It is,
7 specifically, just a listing of checks giving the description
8 and the amounts.

9 Q Okay. And going to page 21, the highlighted yellow.

10 A Same thing. 21, page 22, and page 23 are all similar
11 characteristics to page 20.

12 Q Okay. So 20, 21, 22, and 23 are summarized on page 19 of
13 50, page 19, and tell us what box that fits into on your chart.

14 A That would fit into checks written payable to MIT.

15 Q Okay. That is the -- okay. And what about the second box
16 where you say -- what does the second box say?

17 A The second box just is -- second box says check recorded
18 to account titled WEI; memo, tuition and related expenses. So
19 that applies to our pages 20 through 24 is that is the -- the
20 memo is the memo, and the description is the description.

21 So -- and on page 20 simply the check 7/27/2004 to MIT, it says
22 Ho'o's fall 2005 tuition, and it's classified to WEI.

23 Q Okay. Going down now, let's go to page 18 of 20, the flow
24 chart. What does the middle box refer to?

25 A The middle box says QuickBooks Quicken accounting provided

1 to outside accountants.

2 Q Okay. And based upon your forensic analysis and review of
3 the records, your understanding is these QuickBooks were
4 provided to the outside accountants.

5 MR. HARRINGTON: Objection. Foundation.

6 MR. TOSCHER: Based upon his review of --

7 THE COURT: Okay. Overruled.

8 What was your understanding about whether these
9 QuickBooks were provided to the outside accountants?

10 THE WITNESS: My understanding is that the QuickBooks
11 information was provided to the outside accountants, and the
12 information that was provided that was prepared by the outside
13 accountants coincides with the information that is presented
14 here.

15 BY MR. TOSCHER:

16 Q Okay. Still focusing on pages 18 -- page 18 of 50, the
17 graphic, and when you said based upon the analysis they went to
18 the outside accountants, which outside accountants are you
19 referring to, Mr. Howard?

20 A Chinaka & Siu.

21 Q And if you go to the box at the bottom, the first green
22 circle, tell us what you're trying to talk about here and what
23 supporting documents you have for that.

24 A Yes. If you don't mind, Counselor, I wouldn't mind
25 completing the middle box here with the QuickBooks Quicken

1 accounting and just briefly talk about page 24 of 50.

2 Q Okay.

3 THE COURT: You can go ahead and look at page 24.

4 THE WITNESS: If you look at page 24, you'll see at
5 the top Waimana Trial Balance as of December 31, 2004.

6 The amounts that are reflected, as far as the dollar
7 amounts, are the amounts that have accumulated in the specific
8 descriptions that are illustrated in the first column or the
9 first descriptions. Example, WEI, first line HMB 120-02275.
10 The balance that would be reflective there would be 19,235.39.

11 The point of this document is that each of these
12 items, like, if you look at KBT, KCPK, Master Hong, MK Power,
13 those aren't specific expenses. They're specific expenses, and
14 they may be specific expenses from these descriptions, but a
15 general ledger, basically, breaks down -- and not to be
16 redundant of previous testimony here. A general ledger,
17 though, normally classifies expense by type of expense, whether
18 it's material, whether it's utilities, whether it's taxes.

19 So looking at this from an accounting perspective,
20 not only as a forensic accountant, that these expenses are not
21 specific to a general ledger, this, from 35 years of accounting
22 experience, tells me that the information here is being
23 presented to someone else to classify, to code, to categorize,
24 and to accumulate and review to make a determination on the
25 ultimate -- not only the ultimate deductibility of expenses,

1 but also the classification of expenses.

2 MR. HARRINGTON: Objection on foundation on that
3 response. I understand he's had 35 years of experience, but I
4 don't think there's a foundation for why this was presented in
5 the form it was.

6 THE COURT: Okay. I'll sustain. You can get him to
7 explain how his experience makes him conclude that.

8 BY MR. TOSCHER:

9 Q Mr. Howard, we're referring to page 24 of 50. Are you
10 familiar with receiving from clients check registers or --
11 check registers based upon Quicken and QuickBooks?

12 A Yes. This is a very common practice between clients and
13 their -- ultimately, their CPAs or their accountants. This is
14 a practice that is very common of receiving information in this
15 form -- quite frankly, in almost a junky form -- and, as an
16 accountant, being asked to review those records and classify
17 them and code them.

18 Q If you were to receive something like this at the end of a
19 year for preparing taxes, would you believe that you, as an
20 accountant, would have a lot of work to do?

21 A Yes.

22 Q And that work would -- would that work include preparing a
23 real general ledger and characterizing these expenses?

24 A Correct.

25 MR. TOSCHER: Your Honor, I -- okay. I think we got

1 in what we needed to.

2 Q Okay. The -- and again just for -- page 24 of 50 is an
3 excerpt printed from Government Exhibit 4.1, Mr. Howard?

4 A Yes.

5 Q So if we've completed your center box of the QuickBooks
6 going to the accountant, your first -- what do you try to tell
7 us on your first circle at the bottom, Mr. Howard?

8 THE COURT: So now you're back on page 18.

9 MR. TOSCHER: Yes. Thank you, Your Honor.

10 THE WITNESS: The first box on the left on page 18,
11 it says the checks are re-entered in the Chinaka & Siu and
12 Company accounting program to create a general ledger.

13 Q And can you tell us how you went about determining that
14 with the exhibits.

15 A Yes.

16 Q And the page numbers. Excuse me.

17 A Yes. On page 25 of 50, you see an excerpt from a general
18 ledger. If you look at the top, it says Waimana Enterprises,
19 Inc. It says Year-to-date General Ledger. On the left-hand --
20 furthest part of the left-hand, it says client 410.

21 My practice, meaning my practice and experience, it
22 appears to me that this is a client number that has been given
23 to Waimana Enterprises by Chinaka & Siu.

24 And if you look, starting with 64600, you see the --
25 account number 64600, which is the first to the left. You see

1 a description: Contributions. It lists the names of those
2 contributions. 64700 says political contribution. It actually
3 lists names. 64900 says educational, which I highlighted. It
4 shows that these expenses were classified -- reclassified
5 by the company that prepared this general ledger, was
6 reclassified as educational expenses.

7 MR. HARRINGTON: Objection again, Your Honor, to
8 foundation. I don't think that's consistent with the testimony
9 in this case how these have been prepared.

10 THE COURT: I'm sorry?

11 MR. HARRINGTON: I'm objecting on foundation because
12 it's not consistent with the testimony that's been received in
13 this case about how --

14 THE COURT: Okay. Well, maybe -- but this is what
15 he's assuming.

16 THE WITNESS: Yes.

17 MR. HARRINGTON: So long as it's clear he's
18 assuming.

19 THE COURT: You can cross-examine.

20 MR. HARRINGTON: Thank you.

21 THE COURT: Overruled.

22 BY MR. TOSCHER:

23 Q In focusing on page 25 of 50, is it your understanding
24 that this was prepared by Chinaka & Siu?

25 A Yes.

1 Q Are there indications on this page that it was prepared by
2 Chinaka & Siu?

3 A It appears maybe the Bates stamp at the bottom: CHWA.

4 On page 31 of 50, there's a tax return that states at
5 the bottom the firm preparing the actual tax return was Chinaka
6 & Siu.

7 Q Let me just ask it this way, Mr. Howard. Based upon your
8 review of these records here, is there any doubt in your mind
9 that this general ledger was prepared by Chinaka & Siu?

10 A No.

11 Q Okay. So we're talking about 25 of 50 where these
12 payments are characterized in account 64800 as educational
13 expenses. So what's being done here is that big category of
14 WEI expenses that we saw on page 24 are being broken down by
15 the accountants; is that correct?

16 A That is correct.

17 Q So if you can walk us through 26.

18 A 26 in the -- towards the middle of the page, you'll see an
19 account described as Travel, and you'll see a disbursement to
20 MIT.

21 Q And did you make a determination of -- same thing for page
22 26? This was a categorization by Chinaka & Siu?

23 A Yes.

24 Q In a general ledger prepared by Chinaka & Siu?

25 A Yes.

1 Q Now, continuing with your forensic analysis here -- or
2 let's go back -- let's go back to the chart, page 18.

3 A Yes.

4 Q The second box. The second box is a summary which,
5 basically, summarizes the last two exhibits we were talking
6 about. And it says "Checks classified as educational and
7 travel expenses"; correct?

8 A That's correct.

9 Q So that's a summary of the Chinaka & Siu general ledger
10 information.

11 A Correct.

12 Q Okay. Now, where do we go from there?

13 A We go to the -- a financial statement that's prepared.

14 Q Okay. Is that --

15 A And that would be page 27, 28, and most specifically page
16 29.

17 Q Okay. Again before we get to what's reflected on this,
18 tell the jury what this is here. How does this document says
19 Waimana Enterprises -- page 27, ladies and gentlemen.

20 Waimana Enterprises Statement of Assets, Liabilities,
21 Stockholder Equity, Modified Cash Basis, December 31, 2004.

22 What is being done on these pages and how does it relate to
23 accounting practice?

24 A These pages are a -- and it says See Accountant's Report.

25 These pages are the accumulation or a listing of the

1 final balances of each account that's reflected in the general
2 ledger. These are the actual income, expenses, assets, and
3 liabilities of the corporation.

4 Q Okay.

5 A So this is the end product of taking data for which the
6 client recorded, similar to a checkbook. That information
7 being provided to an independent person who reviewed the
8 information, classified the information, and prepared what is
9 called the general ledger, which, ultimately, when printed in
10 summary form, creates a financial statement. And that
11 financial statement not only shows the assets, which is the
12 amounts of value; the liabilities, what we owe; and the income
13 for the current year, the amount of money we took in; and the
14 expense, the amount that we deducted.

15 Once these numbers have been recorded, then these
16 numbers are normally used in order to prepare the final
17 product, or one of the final products, depending on what the
18 need is, which is the tax return. So all of it goes together.

19 Q So looking at pages 27 and 28, what are these two pages
20 commonly referred to?

21 A They're commonly referred to as the balance sheet.

22 Q And a balance sheet, what does it show?

23 A A balance sheet shows the assets, that's the thing of
24 value, what's owed against those assets, and whatever is the
25 difference between the assets and the liabilities is the

1 equity, or the worth of the company.

2 Q Okay. So the first two pages, Assets and Liabilities,
3 don't show Income and Expenses; correct?

4 A That is correct.

5 Q Could you tell the jury what part of the financial
6 statement shows Income and Expenses. And I believe that's page
7 29?

8 A Yes. Page 29 is the -- what's called a Statement of
9 Revenue and Expenses on the top under Waimana Enterprises,
10 Inc., commonly referred to not only by accountants but in the
11 financial world as an income statement. If you see total
12 revenues or revenues, which would be your first line in the
13 left-hand column, total revenues for the company for the year.
14 There's two columns. There's a current period, which most
15 likely was for the period -- it says for the three -- at the
16 top title it says for three months and 12 months ending
17 December 31, 2004.

18 So the first column would probably be the income and
19 expense of the company for the periods of October through
20 December only, and then the final column, or the year-to-date,
21 is for the annual period, which would have been January 1
22 through December 31.

23 Q Please. I didn't want to interrupt you. Go ahead.

24 A Total revenues right-hand column would be \$3,320,000. And
25 if you look towards the bottom of the page, total expenses

1 would be 3,118,017. And if you turn the page to page 30, the
2 final number is net income. Final tally is \$215,865 for which
3 revenue exceeded the expenses of the company.

4 Q Okay. Could I ask you and the jury to turn back to page
5 29.

6 The highlighted in yellow where it's highlighting
7 they've classified in the financial statement or the income
8 statement these expenses. How do you know these expenses are
9 the educational expenses that were in the general ledger you
10 saw before?

11 A If you turn back to page 25 of 50 and you look at the
12 yellow highlight area, if you look under the account
13 Educational and you see the highlighted area in yellow where
14 the education -- where MIT's expenses are classified, you will
15 see a total at the bottom of the underlying which is
16 \$31,114.34. That would be the total of all those amounts that
17 are there under Educational.

18 If you turn to the financial statement, page 29 of
19 50, you will see in the right-hand column \$31,114.34. It
20 agrees.

21 Q Okay. Same number that was in the previous pages.

22 A Yes.

23 Q Now, there are a number of -- there's a lot of areas of
24 writing and checkmarks and ABCs and Ds. Some of them are
25 highlighted, some of them are not. But before I get to the

1 highlights, tell me what you in your experience recognize these
2 to be.

3 Let me ask you first, are these part of your forensic
4 analysis?

5 A No.

6 Q Okay. The writing there is not yours. Then what are
7 these?

8 A These appear -- these would be common practice in the
9 accounting profession of using either letters or checkmarks or
10 numbers to indicate the combining of numbers in order for the
11 combination of those numbers to be classified under one
12 description to be entered into a tax return.

13 MR. HARRINGTON: Your Honor, can I just state one
14 clarification. There's a number written in red ink? Is that
15 originally on there, or is that something that refers to
16 something else?

17 MR. TOSCHER: That was going to be my next
18 question.

19 MR. HARRINGTON: Sorry.

20 MR. TOSCHER: No, that's fine, Counsel.

21 THE COURT: So we're on page 29?

22 MR. TOSCHER: Page 29.

23 Q There's a number written 41D in red. Is that something
24 you did in connection with your forensic analysis?

25 A That would be my office's internal markings.

1 Q And what is it trying to tell us here? Why did you do
2 that?

3 A Probably that we were -- if you look at page 25 of 50, at
4 the very bottom my office and myself indicated our reference
5 would be 41-1D. You see that in red. That agrees -- if you go
6 back to page 29, that's 41-1D, the same red. That means that
7 that's where we'd look to see where the number came from.

8 It's our internal marking so that we can follow --
9 when we're analyzing something, we can follow the flow and be
10 able to recognize the foundation or the support of what we're
11 looking at quicker.

12 Q Okay. Let's turn back to page 18 again, the flow chart.

13 Page 18, the next to last box, it is a box. What are
14 you trying to tell us with that box? Page 18 of 20.

15 A What I'm trying to tell you is that the check was -- the
16 last box, that total educational expense of 31,114 was combined
17 with other expenses from the financial statement, as indicated
18 by the letters or the checkmarks, other than my red checkmark.
19 But the checkmarks that were on the document, if you add up
20 those markings, you end up with a total of \$175,383 classified
21 as office expense. And if you look at the final column, which
22 agrees to the tax return, that there was a deduction for office
23 expense on the tax return for \$175,383, which included the
24 mistake for educational expense.

25 Q Okay. Can you go -- I would like you to explain to the

1 jury how you determined that the educational expense was
2 combined with other expenses and put on the tax return as
3 office expense.

4 A If you look at --

5 Q You're on page 29, Mr. Howard?

6 A I'm on page 29.

7 If you look at the bottom of the page, you see
8 highlighted the word "office" and a total of \$175,383.38. If
9 you look at the squiggly line and it appears to be "A" before
10 the word "office," that is the internal memo of the person that
11 used this report in order to combine numbers and place them or
12 prepare the tax return. This is a common practice in
13 accounting.

14 So how I know that, if you look at the sum of A
15 office 175,383.38, you look at educational expense, which is
16 highlighted, which is 31,114.34, you see the letter A that is
17 placed next to it, I know that it's included there. And also
18 we added up all the As with our calculator to make sure that
19 they added up correctly.

20 So we know that the number's included in this number
21 called Office. And then when we looked at -- if you look at
22 page 32 of 30 -- well, let's look at 31 of 30 so I can make
23 sure that there is -- that the Court knows where the document
24 was obtained.

25 If you look at page 31 of 50 at the bottom -- and we

1 are red. We write in red. We said Government Exhibit 1-15
2 selected pages. So this came from the government exhibit. We
3 highlighted the -- the line 26 we highlight, says See Statement
4 3, 855,826, which means now we have to go to Statement 3, which
5 is on page 32 of 50. And you will see that highlighted once
6 again is the word "Office Expense" 175,383. That agrees with
7 the financial statement groupings that are shown on page 29,
8 which is all the As, which means education's included in that.
9 And if we keep going backwards, we're able to see where the
10 31,114 came from, which is on page 25. We can see where it's
11 listed in MIT, MIT. And if we keep going backwards, we
12 ultimately end up back on page 23 of 50 and 22 of 50, the
13 original records where this whole process started.

14 So in forensic accounting they call that drilling
15 down on a transaction.

16 Q Okay. So you've stated that -- just to summarize your
17 last two boxes on page 18 of 50, based upon your forensic
18 analysis of the records, is it your opinion that the
19 educational expenses were combined with other expenses from the
20 financial statement and then characterized as "Office Expense"
21 on the tax return prepared by Chinaka & Siu?

22 A Correct.

23 Q Okay. And do you have sufficient forensic evidence, based
24 upon your review of this, of who changed the characterization
25 from "Educational Expenses" to "Office Expenses"?

1 A The evidence suggests to me that the accountants who
2 prepared the ultimate general ledger and the tax return for
3 this entity for 2004 were the folks that were responsible for
4 making these changes and classifying.

5 Q The ones that characterized it as "Office Expense"?

6 A Correct.

7 Q And why do you come to that conclusion?

8 A Because, when I look at the original Waimana -- what's
9 called a general ledger, which would be the internal records of
10 the company, I just see amounts written and classified to an
11 expense called WEI. I see that information then
12 recharacterized, reclassified, and posted, as we use in the
13 word of accounting, to a general ledger that was created by an
14 independent accounting firm. That independent accounting firm,
15 then the general ledger became a financial statement. We're
16 able to trace the numbers to the financial statement back to
17 the general ledger. We see groupings that are consistent and
18 characteristic of certified public accountants grouping
19 expenses by the letter A. We see the letter A. We see the
20 letter A totals \$175,000. And then, finally, we look at the
21 letter A and we're able to follow it all the way to the tax
22 return where it's coded as office expense.

23 So a transaction that started that should have been
24 for tuition --

25 Q Go ahead.

1 A -- and not deductible got classified as "Office Expense."

2 A plain mistake.

3 Q And based upon the forensic evidence you've reviewed, do
4 you form an opinion as to whose mistake it was?

5 A Yes.

6 Q And whose mistake was it?

7 A It would be the independent accountant Chinaka & Siu made
8 the error, made the mistake.

9 Q And do you find in your practice that mistakes like this
10 are made?

11 A They are. And that doesn't -- that doesn't mean that
12 Chinaka & Siu are bad people. We all make mistakes. I've made
13 my share. Mistakes happen. There are a lot of transactions.
14 Accounting is tedious. And things happen. And sometimes
15 things are not classified correctly and mistakes occur that are
16 out of the control of the client.

17 Q Okay. Mr. Howard, I'd like you to turn to page 1 of 50,
18 the top of the chart, and ask the members of the jury -- we're
19 moving on to another topic entitled Recording of Payments to
20 Diane Doll 2003 to 2005.

21 A Yes.

22 Q Okay. Can you just -- the form I'd like to -- tell the
23 jury an overview of what 1 of 50 is, and then we'll get into
24 some of the detail of it.

25 A 1 of 50 illustrates the checks that were written to Diane

1 Doll, the process of reviewing those checks and determining a
2 classification, those checks' ultimate recording in the
3 company's general ledger, and the resulting financial statement
4 and tax return summaries or amounts that were deducted for this
5 expense.

6 Q Okay. So let's start with the first box on top.
7 QuickBooks, Quicken. Checks written payable to Diane Doll 2003
8 to 2005. Can you walk us through the schedules as to how you
9 come up with those determinations.

10 A Yes.

11 Q And give us -- when you -- give us the page number. And
12 again we'll start with the checks written and the checks
13 recorded and the memo description. So I think you can tell us
14 what page number it is.

15 A Yes. Checks written payable to Diane Doll, let's start
16 with page 8 of 50. Once again, the same as with the -- the
17 same meaning, the same characteristics. It's a different year.
18 And if you look at page 8 of 50, it's December of 2003. But
19 the same characteristics. We have what's called a trial
20 balance, and we have specific captions or descriptions of
21 amounts. If we look all the way down at the bottom, we have
22 over \$2,522,718.04 as uncategorized expenses. We know that's
23 not an expense. That's uncategorized expenses. And once again
24 right above it we have in this account called WEI 3,794,270.21.
25 To me, very similar to the tuition issue, we are coding

1 expenses in account WEI or Waimana.

2 Q And page 8 is an excerpt from Government Exhibit 4.1,
3 Mr. Howard?

4 A Yes, it is.

5 Q And when you, as an accountant, receive a page like this
6 from the accountant, what do you need to do with it?

7 A A lot of work.

8 Q Okay. More specifically.

9 A Specifically, if I received this or my staff received
10 this, most likely this would be inoperable. You would not be
11 able to use this information in order to prepare a financial
12 statement or a tax return. You would have to take the
13 information that's presented here and once again review it,
14 categorize it, and put it in an order -- some type of order in
15 order to properly reflect the information in the books and
16 records of the company.

17 Q Okay. So I think the next page would be --

18 A The next page is critical from a standpoint -- it's page 9
19 of 50. Once again, we see the information in the WEI account
20 that's -- that the payments -- once again you have the type,
21 the check, the date, starting with the first one, March 10 of
22 2003, a check number of 2803, a name Diane Doll, and an amount
23 for a thousand dollars. That, on its face, would tell me, as
24 an accountant, if this was information that my office received,
25 or any accountant received, that this is information that

1 strictly says there's a check for 2803 made out to Diane Doll.
2 There would have to be further inquiry onto those amounts as
3 far as classification.

4 Q Okay. Now, going back to your page 1 of 50, in the middle
5 box on top, the circle, you say check recorded to account title
6 WEI. I think that's what you just --

7 A That's just what I pointed out on page 9. It says WEI in
8 the corner there. So that -- from the Government Exhibit 4.1.

9 So that indicates that number. And then the memo
10 description, as I just pointed out, Services Rendered. You can
11 see that in the middle of the page. But that's the information
12 that is being provided, which is indicated in my middle box
13 here where it says "Data provided to outside accountants to
14 prepare Waimana general ledger."

15 So this is the information that's going to the
16 accountants, and it's now their turn to review the work from a
17 standpoint of this is -- I don't want -- it's not a good
18 medical analogy, but this is inoperable. This is, basically,
19 information that -- no better than your check register, and
20 you're giving this to an accountant and saying fix this or put
21 this in some type of order for me.

22 Q Okay. Now, staying on page 1 of 50, you have a line down,
23 and now you have two gray boxes which outline some
24 communications between Nancy Henderson of Waimana and --

25 A And Chinaka & Siu.

1 Q -- and Chinaka & Siu. Can you please tell us what you're
2 telling us here and what the basis of that is.

3 A Well, when we look at that box -- if I could turn the
4 jury's attention to page 10 of 50.

5 MR. TOSCHER: For the record, Your Honor, that's what
6 was just admitted as Exhibit 50-4.

7 Sorry, Mr. Howard.

8 THE WITNESS: If you look at the top date, it says
9 January 20th of 2003. If you look at the subject, it says 2002
10 Tax Return. The date, January 20th of '03, coordinates with a
11 2002 tax information. Everybody's normally worried about their
12 taxes in January of the subsequent year or the start of the
13 following year. It's a memo from Lynn Tamanaha.

14 Q Tamanaha.

15 A Pardon me?

16 Q You're referring to Lynn Tamanaha?

17 A Yes. And it's from Nancy Henderson. So it's a response
18 by Nancy Henderson to Lynn. If you look at number 3, it
19 appears that there's an explanation: Payments to Diane Doll
20 were for health consultant services.

21 Q Okay. Now, that summarizes your gray box.

22 Take us down. Now we're at -- on page 1 of 50 again,
23 the chart. And you -- what are you trying to tell us with the
24 first circle here, Mr. Howard? And then take us through the
25 exhibits, if you will.

1 A Okay. So the fax indicates that the amount is for health
2 consultant services. And so there's all types of consultants
3 practicing in the world, but the bottom line is health
4 consulting services to me would indicate I don't -- I still
5 don't really know what it is, and I should make a further
6 inquiry of what that expense is.

7 And so if we look at the blue boxes, the checks are
8 re-entered into the accounting system by Chinaka & Siu creating
9 the general ledger, page 1 of 50. The checks were classified
10 again by Chinaka & Siu as "Consulting Fees."

11 Q Are you -- Mr. Howard, I may have misheard. Did you say 1
12 of 50 or 11 of 50?

13 A I think it's 1 of 50.

14 Q You're looking at your chart you mean.

15 A Yes.

16 Q I'm sorry. And after that you'll -- I want to make sure I
17 can follow you and the jury can follow you.

18 Okay. Your chart is 1 of 50. I'm sorry. I
19 apologize. Go ahead.

20 A Looking at the chart, we're on page 1 of 50. We're at the
21 bottom. I guess we should start where we look at the -- let's
22 start with the first blue circle that the checks are re-entered
23 into the system.

24 If you look at page 11 of 50, and it says at the top
25 it's an excerpt from Waimana's 2003 General Ledger. If you

1 look at the middle of the page, it says Consulting Fees Diane
2 Doll. So once again, if we look at the top corner of the page,
3 it says client number 40018. It appears that this is the
4 general ledger of the company, and this was prepared by the
5 external accountants.

6 So if you look at account number 67100, we see the
7 name Diane Doll, and we see the amount shown as consulting
8 fees.

9 Q Okay. And that's your second box on page 1 of 50: Checks
10 classified by Chinaka & Siu as consulting fees; is that
11 correct?

12 A Correct.

13 Q Now you're taking us to the preparation of the financial
14 statement.

15 A Correct. Which if we look at page 14 of 50, once again
16 you see a yellow highlighted area. The red is our -- my
17 accounting firm's internal markings for referencing, but if you
18 see Consulting Fees, you'll see Year-To-Date \$6,000, and that
19 agrees -- if we look at the top, it says for the period ended
20 December 31, 2003.

21 If we go back to page 11 of 50, we see Waimana
22 Enterprises 2003. We see that same amount: \$6,000. It's the
23 general ledger. Similar to the educational expense, we're
24 taking the -- 14 of 50 is the Statement of Income, which could
25 be called Statement of Revenue Less Expenses, Statement of

1 Profit and Loss, basically. This statement is the income of
2 the company: the gross receipts plus the expenses. If we look
3 at this, \$6,000 is being deducted as consulting fees and as
4 part of the financial statement.

5 Q Okay. And that's on page 14 of 50?

6 A Yes.

7 Q As Consulting Fees?

8 A Yes.

9 Q How does that tie in to the tax return which was filed,
10 Mr. Howard?

11 A If we turn to page 16 of 50, you see -- and it's an
12 excerpt from Government Exhibit 1-12. If we look at the bottom
13 of the page, highlighted is Consulting Fees, and there is the
14 \$6,000 that is indicated in the books and records.

15 So once again we come to our end product. We have
16 Consulting Fees of \$6,000. We look back at the financial
17 statement, which is the accumulation of expenses. We have an
18 accumulation of expenses, something called Consulting Fees. We
19 keep walking backwards. We see that that agrees, not only the
20 general ledger, we walk back to that fax that says Health
21 Consulting. Doesn't appear anybody made -- I'm not sure if
22 anybody made an inquiry, but it doesn't appear that anybody did
23 any further inquiry to something that is unusual, such as
24 health consulting expenses.

25 We keep backing in reverse, we see that we have money

1 listed similar to our checkbook, which is the WEI expenses. So
2 once again it's the same process as educational expenses. We
3 take data. We pull it through to an end product. We ended up
4 with the wrong answer.

5 Q You have one more exhibit here in terms of your support,
6 17 of 50, which is a 1099. Can you tell us --

7 A Correct. This is a 1099 indicating the -- a tax reporting
8 form that says that this individual was paid \$6,000 for
9 nonemployee compensation. It indicates that this data was
10 original -- was looked at again for tax reporting purposes. A
11 lot of times people throw -- people, excuse me. More specific,
12 accountants will include things in "consultant" or things that
13 make things easier so that they have -- they can complete or
14 correctly prepare a 1099 or a governmental form, but they could
15 miss the classification altogether.

16 The point being that in my office I'm not perfect.
17 We try -- when we prepare 1099s, we try to review the
18 information, not only what's been listed in the books and
19 records. We take a second look at it. We try to get the right
20 classification and make the necessary inquiries in order to do
21 our best to classify things correctly.

22 Q Mr. Howard, based upon your review, were you able to form
23 an opinion, based upon the accounting and forensic evidence, as
24 to who was responsible for classifying this as just "Consulting
25 Fees"?

1 A Yes. For -- and this process occurs -- it starts in 2003.
2 It continues on through 2005. I noticed that in 2006 that the
3 process that we now have a general ledger that seems to be
4 being created -- a true general ledger being created in
5 QuickBooks internally at the Waimana Enterprises level. Still
6 the information is being presented to the accountants to
7 prepare the tax return to review the general ledger.

8 And so when we're looking at the process, I think you
9 have to look at, although the process is different between '03
10 and '05, '05 and -- somewhere around '05 to '08 and then
11 forward, the process indicates that, ultimately, that the folks
12 that are preparing the return are classifying things
13 incorrectly or carrying on from the original errors that
14 occurred in the earlier years.

15 Q Okay. Please, can everybody turn to page 2 of 50. This
16 is very similar to 1 of 50. And I think you just -- you talked
17 about it, and just quickly --

18 A Yes.

19 Q -- summarize --

20 A Let me summarize.

21 Q -- what 2 of 50 is. I think you mentioned it, but I want
22 the jury to know what it is because it's sitting there.

23 A 2 of 50 is the -- once again, a flow chart. Appears from
24 the years 2006 through 2008. If we look at the top box, checks
25 were written payable to Diane Doll for the period '06 through

1 '012. And that's true, but in this particular graph, from 2006
2 through 2008 checks were recorded in an account entitled
3 Consulting Fees, and the memo and the description was Services
4 Rendered.

5 That information was provided to the accountants.
6 The accountants -- and my foundation that the accountants
7 reviewed the QuickBooks posting is in my process of looking
8 through the information and drilling down, as I've demonstrated
9 to you, from the end of a transaction back to the starting of
10 the transaction. I did notice some facts and inquiries from
11 Chinaka & Siu about classifications of other expenses or other
12 materials in the books and records, which gave me a sense that
13 on a monthly or quarterly basis the information was being
14 looked at by Chinaka & Siu.

15 There was no change -- once our process changed where
16 Chinaka & Siu was being more a reviewer of data, there was no
17 change ever made to the consulting fee classification of Diane
18 Doll, and the payments ultimately still were deducted as
19 consulting expense on the tax return.

20 Q Okay. In your experience have you run into other
21 situations where a mistake is made earlier on years before, and
22 it's just carried forward?

23 A I don't want to use the word "common" because it's not
24 reflective of my profession. But we all make mistakes, and we
25 are at times surprised not only of our mistakes, that the

1 mistake could impact or could have occurred for years before.
2 Hopefully, they're caught, but sometimes they're not.

3 Q Mr. Howard, I want to turn to another chart and ask the
4 jury to turn to it, and that's 3 of 50. And perhaps you can
5 as -- maybe you can just explain. It's entitled Proper CPA
6 Professional Care When Recording Payments to Diane Doll 2003 to
7 2005. Can you walk us through this.

8 A Yes. If we look at the -- and this is for the year 2003
9 through 2005. I attempted to do a flow chart, similar to if I
10 was teaching class how I would demonstrate to students a more
11 sound way to prevent a problem like this from occurring.

12 So what I did is I looked at Waimana Enterprises, and
13 we look at the circle on the left. If we look at the box below
14 Waimana Enterprises, it says check recorded to the account
15 entitled WEI. That's similar to what I've represented to you
16 in my analysis when we looked at the trial balance, as we
17 talked about before.

18 The data was provided. As we go to the right, you
19 see the arrow. The data is provided to the CPAs. The data is
20 posted to the general ledger created by Chinaka Siu & Company
21 CPAs. Very common practice in public accounting that we
22 receive information, we look at it, we go, "Oh my God. What
23 are we going to do with this? Let's input it. Let's review
24 it. Let's determine the classification."

25 If we go down on the right-hand column to the second

1 triangular box, it says Data Reviewed During Creation of
2 General Ledger. Obviously, the data is reviewed. Why it's
3 obvious to me is we're creating the general ledger; so you had
4 to review it. Someone's typing it in from point A to point B.
5 If you're handed information, you're creating a general ledger,
6 it's being reviewed by its input.

7 Something caused an inquiry on 12/23/02 -- well, not
8 the -- a response. I saw the response. I never saw the
9 original inquiry, but I assumed -- I assumed that a response on
10 12/23/02 of an inquiry that there must have been a response.
11 What is this?

12 Waimana Enterprises responds. Says response received
13 via 1/20/03 fax. It says description: Health consultant
14 services. And all of a sudden health consultant services, if
15 we look at that final green box, payments deducted is called
16 Consulting Fees. Somehow we ended up health consultant
17 services, let's just throw it into consulting. I don't see an
18 inquiry. I don't see an additional inquiry. It should have
19 triggered something by that response for an additional inquiry.

20 So if we look at -- if it's all right, Counsel, to
21 continue.

22 Q Yes. Go ahead.

23 A Okay. So if we look at the -- I have a triangular gray
24 box: CPA Should Have. If we look to the right, it says Review
25 Response. They should have made a further inquiry to Waimana.

1 That's the yellow box on the left. The response should have
2 been Massage Therapy.

3 If we look at the final box on the right-hand side,
4 massage therapy should have triggered all types of questions.
5 The massage therapy: Who's the massage therapy for? Is it a
6 taxable fringe benefit? Is it deductible to the corporation?

7 If you look at Code Section 162A, fringe benefits are
8 deductible. Normally, unless they're an athletic club -- and
9 this is my research. I researched it as if I was doing this.
10 If I was talking to my class. I'm researching this.

11 I got a response Massage Therapy. We cannot know
12 everything. Some things we know from experience. But we do
13 know that, if we don't know the answer, we should make further
14 inquiries. And, hopefully, as our experience grows, we know
15 how to look things up, we're able to review the information
16 that comes to not only our attention that our research brings
17 to us, and we try to make a proper decision on that.

18 But if I were to receive the response of Massage
19 Therapy, I would have said, is that the proper classification?
20 Should we call it health consulting? Shall we call it massage
21 therapy? It isn't what we call it. It's a taxable benefit
22 deductible to the corporation, but the person receiving that
23 benefit should have -- should be advised that they should
24 report it as income. If the massage therapy is for many people
25 or it's just not often, de minimis -- everybody's been --

1 worked at the office or been somewhere where there's free
2 coffee, snacks. What does "de minimis" mean?

3 Q What does "de minimis" mean?

4 A "De minimis" can mean many things. It can mean its
5 relevance. Is two massages a year -- I don't know what the
6 cost is. \$50 a piece? \$100, is that de minimis? Yes, to me
7 that's de minimis.

8 Q What you mean by "de minimis"? Small.

9 A Small. Doesn't result in any great tax. The
10 administration of the tax associated with that, the accounting,
11 the document filing, is so small that the cost exceeds
12 everyone's benefit. The government's benefit: they don't want
13 to process this. And the clients or the taxpayer doesn't want
14 to process this. It's no good to all. But when you get more
15 than de minimis, then you have to look at the taxability of it.

16 My point being that, as we look at page 3 of 50 and
17 move on to the next page, is these are the questions that
18 should be triggered. These are what clients rely on us as
19 professionals to advise them. These are things that, when we
20 discover them, we don't turn our head and say "Not our
21 responsibility." We look at them. We think about them. And
22 we discuss it with the client, and we try to come up with a
23 proper determination of it.

24 Q Okay. Sorry. Go ahead, Mr. Howard. I -- were you ready
25 to move on to 4-50 and 5-50? Or am I --

1 A Yes. If we look at 4-50, if we look at the top, it says
2 Waimana Enterprises is Preparing the General Ledger. I'm under
3 the -- I will call it more than an assumption. I believe I'm
4 correct that Waimana prepared their general ledger in 2006
5 through '8, and Chinaka & Siu reviewed the general ledger and
6 prepared the necessary -- if we look at the third -- I'm sorry,
7 the second triangular box on the right, green: Provides just
8 the entries, corrections, periodically to Waimana Enterprises.

9 I saw facts. I know that someone was looking at
10 this. Someone was -- I don't want to use the word "monitor."
11 The accountant's not the keeper. But as a professional, you
12 have a duty to your client to, if you see something that isn't
13 proper, you should discuss it, or you should -- it should
14 formulate an inquiry.

15 And then if we look at the final box: Prepares Tax
16 Returns Last Minute. I looked at 2006, 2007, 2008. The
17 returns were all signed. For the 2006 corporate return, it was
18 signed 9/13 of '07. If I look at the 2007 return, the return
19 was signed 3/10 of '09. That return would have been due no
20 later, with extension, than September 15th of '08. And the '08
21 return was signed 9/14/09.

22 So what that tells me as a forensic accountant, that
23 these returns that -- and I'm not here -- I don't have enough
24 evidence to tell you why they were late, but I can tell you
25 from the signature that these things are being done at the last

1 minute. And when people rush, mistakes are made. And that's
2 the point of 4-50.

3 Q Of page 4 of 50.

4 Okay. Now, we have a second chart, 4 of 50,
5 different because the flow of accounting information is a
6 little --

7 A Correct.

8 Q -- different. Is that why you've done that?

9 A Yes.

10 Q Okay. Can you -- we have another, 5 of 50. Why is
11 that -- what are you trying to tell us there, Mr. Howard?

12 A That's a subsequent period: Proper CPA Professional Care
13 When Recording Payments to Diane Doll September 9th -- not
14 September. I'm sorry. 2009 through 2012. Once again, nothing
15 has changed. Waimana Enterprises is preparing a general
16 ledger. The data's provided to the CPA, and a new firm, KMH,
17 LLP, prepares consolidated amounts.

18 Now, what consolidated amounts is, if corporations
19 are related, in other words common ownership, you can
20 combine -- they may have different functions and different
21 business purposes or even handle different segments of a
22 business, but those businesses are commonly owned by one
23 person. And if they're commonly owned, the tax law allows you
24 to take them and combine them or smash them up into one bundle.

25 What appears to me is that the KMH was preparing

1 consolidated tax returns because there was another corporation,
2 SIC, there's ClearCom, there's Waimana. But anyway, all the
3 data still -- although, it gets bigger because, if you have
4 more than one company and you have more activity, it gets
5 bigger. The numbers get bigger. The transactions get bigger.
6 The accounting gets bigger. It gets difficult to monitor all
7 this.

8 And so what KMH -- from the forensic information what
9 I'm relying on is I know that I did see some more papers
10 consolidating the company's amounts, but I do see tax returns.
11 And once again, when we look at the consolidated return -- I'm
12 sorry, 2009 return was filed September 15th of '10. The 2000
13 return was filed September 15 of '11. 2011 the return was
14 filed 9/7/12. And, finally, 2012 the return was signed
15 9/16/13.

16 And even in the returns, when I was looking through
17 the returns, there's a disclosure from the accountants that
18 says "We don't know if this is right." And sometimes the
19 disclosures, there's nothing wrong with the disclosure. But
20 all that tells me: that the returns were being filed late.
21 There were some concerns with the returns. And they may not
22 have been nothing to be concerned about. I don't know. But
23 once again we're rushing around, we're not focused, there's too
24 much to focus on, and mistakes happen. That's my point of
25 this.

1 Q Okay. Thank you, Mr. Howard.

2 There was just one -- for completeness, I'm not
3 sure -- page 6 and 7, just some schedules of the --

4 A Yes. We may want to just quickly look at page 7.

5 Q Yes. Just very quickly, just so the jury knows what they
6 are for completeness.

7 A Page 7 is just a -- payments to Diane Doll and the
8 classification. I call this the formative years, meaning that
9 this is the start of this process. And if during the formative
10 years, if the process would have been handled correctly, the
11 process may not have ever ended up that this particular item
12 was deducted for the period that it was deducted for. Or if it
13 was deducted, proper tax treatment to the person receiving the
14 benefit would have occurred.

15 But this is the formative years. And if you look --
16 in the second column it says the date, which we have in the
17 first box: 3/10 of '03. We drop down in the middle of the
18 page: 2/20/04. And we go down to the third area, which is
19 2/18/05. If we look at those three years, we see that it
20 starts out in year one, meaning year three, Services Rendered.
21 The accountants classify it as consulting fees.

22 In 2004, once again we look at not only the
23 classification. We see that it's in all the years by the
24 internal accounting staff -- we look at the top where it says
25 Internal Accounting Staff -- it's all coded to WEI. The

1 accountants over that three-year period classify it as
2 Consulting, Consulting, and then Miscellaneous Operating
3 Expenses. So we're just not getting it right. And that was
4 the point of this schedule.

5 Q Okay. That is referring to page 7; is that correct?

6 A That's correct.

7 Q Okay. Mr. Howard, I'd like to turn to another topic.

8 THE COURT: Then why don't we take our lunch break
9 now and come back at 1:00. Okay?

10 MR. TOSCHER: Yes, Your Honor.

11 (Court recessed at 11:45 A.M., until 1:07 P.M.)

12 THE COURT: My plan is to go to 2:30, take a break.
13 When we come back from the break, then we'll go till 4:00.

14 MR. TOSCHER: Thank you, Your Honor.

15 May it please the Court. Ladies and gentlemen. Good
16 afternoon.

17 Q Good afternoon, Mr. Howard.

18 Mr. Howard, could I get you to turn, and ask the jury
19 to turn, to page number 33.

20 Mr. Howard, we're on page -- can you tell -- pages
21 33, 34 through 36, will you describe to the jury what you've
22 done here on these pages, sir.

23 A These pages represent the cash advances or cash
24 withdrawals that Mr. Hee made from the period of 2/8 of '07
25 through -- through the end of -- I'm sorry, through 11/9 of

1 '12. These payments were cash advances, these amounts were
2 denied as deductible, and they total approximately -- exactly
3 \$26,708.50, the actual cash advance, and there's some
4 additional banking fees involved.

5 Q Okay. Just going -- we're looking on page 33, just so we
6 understand it. The first column you have the year involved;
7 correct?

8 A Correct.

9 Q And then the next column you're referring to the
10 government exhibit numbers; is that correct?

11 A Correct.

12 Q And then the next column on the date, that is the -- those
13 are the dates that the cash is being withdrawn.

14 A Yes. Specifically, the transaction date.

15 Q Transaction date. Okay.

16 Now, going down where it says -- the middle column --
17 Destination Purpose Per Reimbursement. First, tell me -- it
18 says Location, and then we have various indications here. The
19 first one says Honolulu Airport; Los Angeles; Flushing, New
20 York; San Francisco; and then there's some finance charges.

21 What is that information based upon? What is that
22 information?

23 A The information is based upon the location. If we look at
24 the first line, New York City and Washington, D.C., should
25 agree to the reimbursement reported on the Government Exhibit

1 459 as the -- Mr. Hee's description of the trip and the period
2 for which the trip occurred.

3 Q Okay. So to make sure I understand, on the reimbursement
4 on the Waimana business records, the first one, it basically
5 says New York City and Washington, D.C.?

6 A Yes.

7 Q Okay. And then the unbolded items here relate to the
8 location.

9 A Right. That's the location that we observed by reviewing,
10 when possible, and for the most part there was actual ATM
11 receipts or receipts which listed the location of these
12 withdrawals.

13 Q Okay. Based upon your review of this, is it fair to say
14 that substantially most every one of the withdrawals is when
15 Mr. Hee is out of town?

16 A Yes.

17 Q And the descriptions, the bolded ones -- and we're not
18 going to go through every one, but the next one from Government
19 Exhibit 460, San Francisco and Washington, D.C. meetings with
20 Deutsche Bank and RUS.

21 A Yes.

22 Q And that's based upon the Waimana business reimbursement
23 forms.

24 A Correct.

25 Q So where it's bolded, that's the reimbursements forms, and

1 where the -- where it's not bolded, that's the location of the
2 withdrawal itself.

3 A Yes, when identifiable.

4 Q When identifiable. The -- now are these numbers very
5 similar to the government's numbers? Have you compared these
6 to the government's numbers?

7 A Yes. I believe they're the same or agree to the criminal
8 complaint.

9 Q If -- looking at this information, let's assume that there
10 is a lack of a description as to what the actual cash was used
11 for, okay, on these withdrawals. As an accountant, with the
12 information you see here that's based upon the records, how
13 would you deal with that and advise the client?

14 A I would advise the client that -- the first question I
15 would ask the client is did the expense occur and do they
16 recall what it's for. The second thing that I would ask the
17 client is what substantiation do you have?

18 This particular case we have a description of a
19 location, and in several of them it says specifically a
20 business or a purpose, i.e., example Exhibit 461 it says
21 Washington, D.C., and New York meetings with Deutsche Bank and
22 U.S. congressional members. I think that gives a purpose. I
23 think the taxpayer, I would tell them to be prepared, if
24 questioned regarding that particular meeting, be able to
25 discuss not only the purpose of why you went and, within the

1 confidentiality boundaries, be able to discuss what business --
2 what business was discussed and what maybe was accomplished or
3 not accomplished.

4 The second thing that I would ask a client to do, if
5 they could, is to provide a receipt or some type of written
6 record to not only identify how the money was used but identify
7 what the expense was for.

8 If we look at a concrete example, a concrete
9 situation where every expense has a receipt and there's no bend
10 in that analysis, sure, without a receipt there is a portion of
11 this expense that isn't substantiated, and there is a
12 possibility that it would not be allowed. But as I tell
13 taxpayers, in not every instance do we get a receipt for
14 everything we do. There are certain expenses whether when
15 you're traveling, sometimes it's very difficult if you have to
16 tip or thank a bellman, or sometimes you'll hop into a taxi and
17 things will be rushed. Now they have the credit card swipe.
18 But even now it's difficult sometimes, especially when you're
19 rushed or you have a situation where your mind is on other
20 things.

21 There's a lot of times that a receipt just isn't
22 obtainable, or you make a mistake and you don't have a receipt.
23 For me, myself, I left a parking structure last night, and I
24 was so tired I forgot to get the receipt. It doesn't mean that
25 I wasn't parked for a business purpose and the event didn't

1 occur.

2 So to answer your question, the more information that
3 a taxpayer can obtain, the easier it is to verify and
4 substantiate it, but it doesn't necessarily mean the expense
5 didn't occur.

6 Q Is there anything you've seen in the review of the --
7 these are the cash reimbursements -- that suggests at all that
8 this was not for business purposes?

9 A I've seen nothing that indicates to me, from reviewing
10 this, that would lead me to be absolutely certain that these
11 expenses were not for business purposes. The preponderance to
12 me, as an accountant and representing taxpayers, is it appears
13 to me that these were for travel expenses or money to be used
14 while traveling.

15 Q So if the taxpayer did not have the taxi receipt or the
16 meal backing up the ATM, would you feel comfortable advising
17 the client that they could deduct them on their tax return?

18 A I would tell them that I believe it is a deduction. I
19 believe the expense occurred. I believe that, if they are
20 confident, after inquiring from them what the money was used
21 for, that it appears reasonable that the money was used for the
22 purposes indicated to me by the taxpayer, I would advise them
23 that I would take the deduction but also keep in mind that I
24 would like them, at least on a memo or some type of pad -- some
25 type of writing, to do their best to at least list the reason

1 why they don't have a receipt or substantiate the actual
2 specific expense better.

3 Q Now, you testified before. Do you have experience
4 handling IRS audits?

5 A Yes.

6 Q And there are times when the IRS asks for a lot of
7 detailed substantiation; isn't that correct?

8 A Yes.

9 Q Let's say the IRS came in, was auditing, and asked for
10 detailed substantiation. They said we want the taxi receipt
11 when you were in Washington, D.C. Tell the jury how that
12 normally would play out in an audit.

13 MR. HARRINGTON: Objection. Relevance.

14 THE COURT: I'll let him answer. Overruled.

15 THE WITNESS: I would have discussions with the
16 revenue agent regarding the expense. I would explain to the
17 IRS agent what the business purpose of the trip was for, why
18 the expense incurred, what was incurred. I'd discuss the issue
19 with them. And probably from mutual agreement, although not
20 absolutely every time, there would be a situation where we
21 would either agree that the expense was allowable, and if we
22 didn't agree, we would agree to disagree, and it would be just
23 an adjustment for which wouldn't be allowed as a deduction.

24 BY MR. TOSCHER:

25 Q I would like you to turn now to page 48 marked as Exhibit

1 46A. If we could follow the same procedure, Mr. Howard, as we
2 did last time. Can you explain what page 48 is, and then we'll
3 go through the backup of page 48, what you did.

4 A Yes. Page 48 is a graph. And what I have graphed in the
5 bar -- in the bar chart, the blue bars represent the -- if you
6 look at the bottom of the chart, we have dates from the period
7 of October 30th, 2007, through October 3 of 2008. And it is my
8 understanding, plus verification from the books and records of
9 Waimana Enterprises, specifically the general ledger, that
10 there were investments of substantial amounts into a
11 corporation by the name of Siometrix in the Santa Clara area by
12 Waimana Enterprises, Inc. The actual amounts totaled, in
13 aggregate, over the period of October 30th, 2007, through
14 October 3d of 2008, totaled close to \$4 million.

15 I'm also -- was advised that there was a purchase of
16 a Santa Clara real property, which is also in Norton
17 California, and within proximity also of Siometrix, in June 16
18 of '08 for approximately a million three hundred thousand
19 dollars. So what this graph attempts to do is in the blue
20 --with the blue bars, I've graphed the amount of investment in
21 the Siometrix asset, which totals up over 4 million dollars
22 into October of '08, and I also have graphed the investments in
23 the Santa Clara real property as of October 3, '08, totaling
24 over a million -- probably about a million three.

25 So what this graph shows is that Waimana has

1 substantial investments totaling in the aggregate of close to
2 \$5.8 million in Santa Clara.

3 Q Could you describe for the jury there's pages 49 and 50,
4 how they relate to the chart.

5 A Page 49 there is an account, if we look at it, says
6 Waimana transactions by account as of December 31, '08. If we
7 look at the left column, account number 19020, it says
8 Investment in Siometrix. This to me indicates that this
9 account, being at the 1900 level, indicates to me that it is an
10 asset of the corporation. It's shown as an asset and not
11 deducted. The check column just indicates that checks were
12 written. The date is the date. The number column indicates
13 the check number, or if there is no number, some other method
14 of transfer of money occurred. The name is the name of the --
15 who the payee was from the check. The memo talks about whether
16 the money was a wire transfer or investment.

17 But this is a listing in the books and records of
18 Waimea --

19 Q Waimana.

20 A Waimana, excuse me. Shown as an investment of 4.165
21 thousand dollars.

22 Q Okay. Were you provided information -- I'm referring to
23 the Santa Clara property, that Mr. -- two of Mr. Hee's children
24 lived there during the time or at the time while they were in
25 school in Santa Clara?

1 A Yes.

2 Q And were you also provided information that the children
3 rented out some rooms to other Santa Clara students?

4 A Yes.

5 Q Now, with those factual background could you give us --
6 were you able to form an opinion as to whether the house
7 investment was handled properly on the books and records and
8 tax returns of Waimana?

9 A If we turn to page 50 of 50, or the last page in this
10 binder, once again we see an account called 19200 investment
11 property in California. Shows the entry is not only a general
12 journal, but a check. And the amount or the purchase of the
13 home was listed as an investment or an investment property of
14 the corporation.

15 So in my opinion the reporting of the investment as
16 an asset of the corporation was a proper reporting of that
17 asset for the corporation.

18 Q What about the children residing in a couple of rooms
19 and renting --

20 A Well, the children resided -- my understanding the
21 children did go to school up there, did reside in a couple of
22 rooms. My opinion, and through forensically looking at the
23 postings of the information to the books and records, it
24 appears that this asset -- not only was the asset posted to an
25 investment account, it was very consistent in showing the asset

1 as an investment.

2 So the corporation is the owner of the asset. The
3 corporation stands to benefit by the ownership of the asset. I
4 would take the position that most likely any rental income from
5 the children or the children living in the property would be
6 ancillary to the purpose of holding this asset, and that the --
7 I would not -- I would strictly treat it the way it was
8 treated: as an investment.

9 Let me follow just one thing, if you don't mind.
10 Also the investment -- as part of keeping the investment, I
11 think a property is probably better cared for if someone's in
12 it or someone's using it and caring for it than sitting vacate
13 or alone. I just think it's good practice.

14 Q Did you do any analysis of what the tax impact would be on
15 the corporation if it was accounted for as a rental and not an
16 investment property?

17 A Well, when a property is treated as a rental property,
18 then it has -- then you're able to depreciate the building
19 portion of the building. Depreciation is a noncash expense,
20 but it is a real expense. It's an allowable deduction.

21 So my analysis is analyzing the amount of rent, I
22 guess the word would be "imputed," versus or less the
23 depreciation expenses to care for the property, my analysis led
24 me to believe there would not be a corporate tax.

25 Q Talking about this imputed income for Mr. Hee's children

1 living there, did you form an opinion as to whether that should
2 be taxable to Mr. Hee?

3 A When I give it -- when I think through it, the corporation
4 owns this investment; it gains by the appreciation of the
5 property. It's my understanding that the children lived in the
6 property, not children, small children, but children over the
7 age of 18. I would say if we had to impute income, I would say
8 it would be the children's income, if we went that far.

9 Q I'd like you to turn to page 37. I'll get there soon.

10 Could you tell us what the chart on page 37
11 represents, Mr. Howard.

12 A As part of any forensic study, or even if there was a
13 certified audit of the financial statement, accountants like to
14 know -- like to do statistical analysis or scope the issue at
15 hand to get a relationship of what the possible issues may be
16 occurring to the total of all the expenses or all the income.
17 It's, basically, analytical review. We call it analytical
18 review because we look at statistics, and we try to make
19 determinations of what those statistics might imply. Although
20 the implication may not be always absolute or perfect or
21 correct, it leads us into theory of correctness and
22 completeness and is just a starting point to the additional
23 analysis that needs to be done.

24 So this particular chart, what I did was I graphed --
25 there are expenses that bring us here today that are being

1 challenged, and I compared those expenses to the total expenses
2 for the period of 2002 through 2012 to get a percentage of the
3 challenged expenses to the total.

4 Q And what is that percentage, Mr. Howard?

5 A The percentage of challenged expenses to the total was .39
6 percent or almost -- it's less than one half of one percent, or
7 just more than one quarter of one percent. So it's a very
8 small amount.

9 Q Could you describe the ensuing pages 38 through --

10 A 38 through --

11 Q Take us through them briefly just how it relates to your
12 chart so the jury understands your methodology.

13 A 38 through -- 38, 39, and 40 is just a recap or a adding
14 of the income -- total income that was reported per the
15 returns, the actual tax returns, to the total deductions that
16 were deducted on the returns for the period of '02 through '08.
17 That would be page 38.

18 Page 39 would be the total income less the total
19 deductions that was reported on the returns, the tax returns,
20 the consolidated returns, from the period 2009 through 2012.

21 Page 40 is specific detail. Actually, what it is is
22 what we talked about earlier in my testimony of drilling down
23 deeper. Where are the numbers being provided from? What is
24 the underlying source of them? How do we come to our
25 conclusion? These are the income and deductions for the

1 consolidated amounts for the period '03 through '08.

2 41 of 50 is '02 through '04.

3 And, most importantly, at the end of the day, after
4 analyzing everything, if we could turn to page 47 of 50. When
5 we look at this, and this is what the chart or the pie chart
6 that I provided for you that began this conversation, if we
7 look at the period of 2002 through 2012, if we look at the
8 bottom, the original amounts or deductions on the return
9 totaled \$496,410,356. If we look at -- if we continue to the
10 next column, if we look at the challenges by the government,
11 that being wages, benefits, consulting, travel, office, meals
12 and entertainment, other, the total is \$1,941,950.

13 In other words, if the government's allegations or
14 challenges are 100 percent accurate, then we're, at most, a .39
15 percent deviation.

16 Q Okay. And looking at 47 of 50, that same .39 percent is
17 the same reflected on your chart, page 37; is that correct?

18 A That is correct.

19 Q And all this information is based upon tax returns and/or
20 government exhibits, Mr. Howard?

21 A Yes.

22 Q Okay. I'd like to move on to another topic, Mr. Howard.

23 And if I can ask for the publication of Exhibit 4-82,
24 Government Exhibit 4-82.

25 Mr. Howard, have you had the opportunity to see

1 before today Exhibit 4-82?

2 A Yes.

3 Q Have you had the opportunity to review the books and
4 records of Waimana concerning the transactions which were
5 treated as "loans to stockholder"?

6 A Yes.

7 Q Were you able to come to an opinion as to whether the loan
8 characterization was proper?

9 A I believe it was proper.

10 Q Could you tell us what your opinion was and your reasoning
11 for it.

12 A Well, when I reviewed the schedule, it appeared that those
13 expenses were not business-related. They appear to be expenses
14 that most likely were attributable to Mr. Hee or his family.
15 It appears that they were paid by -- or funds were paid -- or
16 the expenses were paid by using funds of the corporation. And
17 the actual payment of these expenses did not have an ordinary
18 and necessary business purpose to the corporation; so,
19 therefore, it appears that they would have been funds that were
20 being advanced to Mr. Hee or monies that he was borrowing in
21 order to pay those expenses.

22 Q The -- in your experience is it common practice for
23 closely-held corporations to characterize payments made on
24 behalf of their shareholders as a loan to shareholder?

25 A Yes.

1 Q And how often does that occur in your practice?

2 A I cannot empirically tell you that 8.2 clients out of
3 every 10 that this is a common occurrence, but I can tell you
4 that it occurs extremely often.

5 Q Now, if this advances or this loan to shareholder was
6 never documented as a promissory note, how does that affect
7 your opinion, if any?

8 A Well, it's always -- it is better to have a promissory
9 note than not because a promissory note is going to document,
10 in writing, intentions. However, my experience with
11 closely-held shareholders, and as we've talked about before,
12 Little GAAP, Little General Accepted Accounting Principles, it
13 is quite often that a promissory note is not prepared. Quite
14 simply, normally, the shareholder is not concerned about
15 securing the note with himself because it's himself that needs
16 to pay it. It is not something that, at first light, although
17 the intention may be to repay it, I don't think an intention is
18 someone not to pay themselves money that they feel that they're
19 owed to themselves.

20 So it is quite common that, unfortunately, that there
21 aren't promissory notes in every instance drawn up. It doesn't
22 neglect the point that the money was advanced, that the money
23 was borrowed, and someday it's going to be repaid.

24 Q Is it important that it's reflected on the books and
25 records of the company as a loan?

1 A Yes. Because it is an asset of the corporation. It is a
2 liability -- it is a liability of the shareholder, and it needs
3 to be reflected on the books and records so that there is
4 evidence that it occurred and that, when it is repaid, there is
5 a basis for repaying the amounts that are due.

6 Q Does the Tax Code provide for rules concerning what's
7 referred to as the imputation of interest if there's no note
8 and no stated interest in a note?

9 A Yes. Normally, the rule is -- is for demand notes -- and
10 that's normally the case of advances to shareholders of
11 closely-held companies -- normally, the rate is the applicable
12 federal rate on a short-term basis. And that is published
13 monthly by the government and can be found in various sources
14 on the internet, a very common percentage.

15 Q Have you had a chance -- can we go to the final page of
16 the Exhibit 4-82. Have you had a chance to review this exhibit
17 and calculate what the AFR would have been on these payments
18 over this period of time? And did you have enough data to
19 formulate whether the payment of \$736,000 included all the
20 accrued interest during the period of time?

21 A I had enough data from a standpoint of I had amounts,
22 check numbers, dates, and a repayment date. I was able to --
23 or my staff was able to find, through reliable sources, what
24 the APR rate on a short-term basis was for the period -- I'm
25 sorry, I can't see that far, but I think it was '07 to '013.

1 But we were able to find the rate on a monthly basis,
2 and we calculated on a month-by-month basis, imputed the
3 interest. And when we completed our analysis at the point when
4 the 713,000 payment -- that \$713,000 approximate repayment
5 occurred -- and I say "approximate" because I can't see -- we
6 were very close to paying off the note, or I think we may have
7 even paid a little in excess of the note.

8 Q Right. The \$736,000, it shows right now a credit balance
9 of 73. I apologize that we can't see it that good. But do you
10 recall when you calculated the interest, that that payment of
11 736,000 fully paid the loan and all the interest?

12 A Yes.

13 Q Now, were you able to -- did you analyze and consider
14 whether these loan advances should be considered income to
15 Mr. Hee?

16 A A loan is a loan. So the loan was repaid. It was repaid
17 at or in excess of an imputed interest rate. And so I would
18 consider it a loan and not income to Mr. Hee.

19 Q So you have formed an opinion that these loan advances are
20 not income to Mr. Hee.

21 A Correct.

22 Q Now, I think we also, but just for the record what I'm
23 clear, concerning the cash withdrawals we talked about. I
24 think I asked you, Did you form an opinion as to whether those
25 cash withdrawals on the Optima card should be considered income

1 to Mr. Hee?

2 A I believe that the recordkeeping should have been a little
3 bit better, but I would not have included it as income to
4 Mr. Hee.

5 Q And that's your opinion, sir.

6 A That's my opinion.

7 Q Okay. Let's -- you're familiar with -- I guess you
8 recently received, as we did, the government's schedules. I
9 think you have a copy of what's been marked as Exhibit 18
10 overall.

11 A Yes. Yes.

12 Q Let's -- I'd like to discuss with you the adjustments for
13 wages to both Mrs. Hee, Wendy Hee, and the wages to the
14 children and also the associated benefits. You've had a chance
15 to review the government's schedules on these?

16 A Yes.

17 Q Now, let's focus on Mrs. Hee for a moment. Could you tell
18 us why you believe it was reasonable, or do you believe it was
19 reasonable for the company to pay Mrs. Hee a salary?

20 MR. HARRINGTON: Objection, Your Honor. To the
21 extent he's asking is it reasonable, this relates back to our
22 earlier hearing.

23 THE COURT: He's rephrasing.

24 MR. TOSCHER: Yes. Let me rephrase.

25 Q Have you reviewed the various facts regarding the payments

1 to Mrs. Wendy Hee, her salary payments?

2 A Yes.

3 Q And have you -- do you believe that the amounts paid to
4 her are deductible for tax purposes?

5 A I believe that they are.

6 Q And could you tell your reasoning to the jury, please.

7 A My reasoning is is that it is my understanding that
8 Mr. Hee has a -- not only a high-profile job that he is -- his
9 companies are very, very interconnected and related to the
10 homelands of the Hawaiian Islands. I'm also of the
11 understanding that he provides telecommunication cabling and
12 services to restricted areas within these islands.

13 I also know that he's called upon to be in not only
14 business settings -- business can be social. It can be also
15 critical business situations for which it is proper to have not
16 only your spouse with you, but it's also considered part of
17 your overall -- I don't want to use the word "reputation," but
18 your overall presence to the islands and to the businesses that
19 he's in.

20 I also know that Mrs. Hee is extremely educated. I
21 know that she went to an Ivy League school. I've read that she
22 has a degree in planning, in community planning. I also know
23 that it is a long-term relationship; that it started, I
24 believe, when they were in high school. I understand that she
25 is a confidant of his.

1 MR. HARRINGTON: Objection, Your Honor. This is all
2 outside of the record. It's not in evidence. There's no
3 foundation.

4 THE COURT: Well, he's saying that he presumably
5 reviewed some materials. It doesn't have to be admitted into
6 the record. He's an a expert. So overruled.

7 THE WITNESS: I know, as I was saying, that she's --
8 it's my understanding that she's been with him since the
9 inception of these companies and before that. Long-term
10 marriage, long-term confidant, extremely educated.

11 I was looking -- it was kind of interesting, and as
12 part of my answer here, I was looking at a court case that
13 occurred in the Ninth Circuit, which is the area that handles
14 the western United States, back in 1964, of all things. But
15 very relevant today. Because when I thought about it, it was
16 the -- it was the *U.S. v. Disney*, and it was Walt Disney. And
17 we all know that Disney is very, very concerned --

18 MR. HARRINGTON: Objection, Your Honor, to the extent
19 that he's giving legal instructions and summarizing the law.

20 THE COURT: Well, I'm more worried about getting away
21 from the original question. So I need a question.

22 BY MR. TOSCHER:

23 Q Okay. We'll stop that.

24 Mr. Howard, in your experience is past services to a
25 company a relevant factor in determining whether compensation

1 is allowed to be paid?

2 A Yes.

3 Q And is there any requirement that somebody have an office
4 at the company?

5 A A physical presence, in my opinion -- physical presence,
6 although it may be an added condition, is not a requirement in
7 order for an expense to be deductible or a person to be
8 employed by a company.

9 Q Okay. Now, based upon your review of everything, have you
10 been able to form an opinion as to whether the wages paid to
11 Mrs. Hee should be considered a constructive dividend to
12 Mr. Hee?

13 A I believe that the wages should be treated as wages and
14 taxed how they were taxed with the original filing of the
15 return as taxable income and tax owed on them.

16 Q So do you have an opinion -- okay. You don't believe they
17 should be treated as constructive dividends to Mr. Hee.

18 A No. I believe they're income of Mrs. Hee.

19 Q And were those properly reported on the joint income tax
20 returns filed by Mr. and Mrs. Hee?

21 A Yes.

22 Q Now, let's turn to the payments made -- the salaries to
23 the children.

24 A Yes.

25 Q Were you able to form an opinion, a judgment, as to

1 whether those salaries to the children could be paid and
2 properly deductible?

3 A Salaries for the children. The salaries paid for the
4 children, the children were employed at one time, employed
5 working -- working in the business, working actually physical
6 labor. They were preparing to -- Mr. Hee was preparing them to
7 eventually at some point be the future of the corporation. And
8 there is case law. I did find one case -- I think it's
9 *Kitner* -- that said that wages for -- as an inducement for
10 someone to return to their employment in the future can be
11 deductible as current wages.

12 I think in this issue -- I think that in light of the
13 circumstance here, I know from my forensic work that there were
14 returns filed for the children. That those returns were filed
15 by the same firm that filed Mr. and Mrs. Hee's return. I know
16 that probably this issue should have been addressed sooner than
17 later or before it came to this point as where we're at today,
18 but there may be a basis to take this deduction. But I --

19 Q Go ahead.

20 A But I would caution, when taking this deduction, I
21 probably would have wanted to address the situation with the
22 client, or with Mr. Hee if I was his accountant. I would have
23 liked to get the facts and circumstances. Once the facts and
24 circumstances were determined, if we decided to take a position
25 for not future services but services to entice or to ask for

1 the return of our family members to carry on the family
2 business. And I know -- I'll say from hearsay, but I know
3 Mr. Hee is very concerned about his business being carried on
4 by his Hawaiian culture and his Hawaiian roots.

5 I think I would have filed with the return -- if we
6 decided to take that position, I would have filed what's called
7 a Form 8275, which is a form that is a disclosure form.
8 Although it was very open, as far as the accountants were
9 well-aware that wages were being paid, and that the children
10 were receiving payment from the corporation, I think I would
11 have taken the added measure to file this form with the tax
12 return just as a precautionary factor. Because if this
13 deduction turned out that we couldn't -- that there was a
14 disagreement, or we ended up in a situation here today where
15 the expense is being challenged, at least with that form it
16 would reduce the -- not only the penalties but would reduce the
17 nature of the issue at hand regarding that deduction.

18 Q All right. So let me ask you a hypothetical. If you were
19 the preparer of the return, and you were doing the children's
20 returns, and you knew they were full-time students in college,
21 and they were getting substantial salaries during this period
22 of time, and you were also the preparer of the corporation
23 returns, in this situation Waimana, is what you're telling us:
24 that you, as a CPA, should have inquired further with the
25 client?

1 A I think it's good, professional care. I think you can't
2 just -- the problem with accountants is that we're -- I'm sure
3 like all of us and attorneys -- we're all overworked and we're
4 always behind and we're all working into the middle of the
5 night. Things get out of -- things get too much, and it
6 becomes just get the product -- get the return out the door.
7 Get it filed.

8 But there has to be some standard of care, some
9 thought process. There comes a time when you have to have your
10 eyes open. You have to see the whole picture. If you see the
11 picture and you have concern, then I definitely think you have
12 a duty to talk to your client, sit down with your client and
13 discuss the issues, and work it through the thought process as
14 we're doing here today.

15 Q So let me ask you a question. We saw up on the screen --
16 I'm not going to -- I don't think we need to bring those up
17 right now. I can't remember the exhibit number -- but
18 engagement agreements with the accountants. Okay. And are you
19 saying notwithstanding -- how do those engagement agreements
20 fit in with your statement as to the CPA's obligations?

21 A It's interesting because I talk quite extensively about
22 this to my students. You have a letter. It says that it is
23 the -- it is yours, meaning the client, responsibility for
24 everything, and all I'm going to do is put that information
25 into a form and hand you a return, and it's your return, and

1 you're responsible for it.

2 And the question is, you can't duck your
3 responsibility as a taxpayer, without a doubt. But as a
4 professional, when you're preparing a return, if you see
5 something that doesn't appear correct or something troubles
6 you, you have a duty to bring that question up to the client.

7 For 35 years I've represented clients, and it's a
8 very scary thought that I've handed them their tax return, and
9 they sign it like this. They say "I don't know what I'm
10 signing" or they don't care what they're signing. They trust
11 me. So there's a level of trust.

12 In these engagement letters it says we have no
13 responsibility to find -- I think it says irregularities or
14 fraud. But I think that statement is more for not the fraud --
15 not fraud of you, the taxpayer, it's the fraud that's out there
16 that you could be getting ripped off. I think they're standard
17 letters. They're generic. I think accountants rely on them.
18 They're a standard starting point, but I certainly don't feel
19 they're the end point in professional diligence.

20 Q Okay. You gave us your opinions regarding the wages paid
21 to Mrs. Hee and the wages paid to the children and your
22 reasoning. Does the same apply to the benefits that they were
23 receiving under the company benefits policies? I think that's
24 item 7 on chart Schedule 2A. Is there any difference in your
25 analysis?

1 A Well, the benefits are a relationship or a functional
2 variable of the wages. If you don't have the wages, then you
3 don't have the benefits. If you believe the wages are
4 deductible and proper, then you have the benefits. They're
5 not -- they doesn't stand alone. They're in conjunction with
6 the wages; so my reasoning would stand the same.

7 Q And your opinions are the same -- or opinion the same as
8 to whether -- regarding deductibility by the corporation?

9 A Yes.

10 Q And whether it should be a income to Mr. Hee.

11 A Correct.

12 Q Now, I want to ask you to turn to Schedule 6 of what's
13 been marked as Exhibit 18 for identification -- or 6B. 6 and
14 6 -- 6B, Mr. Howard.

15 Have you had a chance to review the schedule?

16 A More than briefly. I haven't had a chance to verify the
17 schedule; I just received it a day ago. But at face I've
18 looked at it, yes.

19 Q Okay. Let's just look these notations. If you look at
20 the column -- the notations on the AmEx statement or
21 reimbursements, did you get a chance to look at those and the
22 justifications for these expenses?

23 A I'm able to look at the description and the statements.
24 Example, I think number 9 on the first page, it says Hawaiian
25 Airline ticket for Wendy Hee, Honolulu, Hawai'i, to San Jose

1 and back. Date of departure. It says Travel CC Marine France
2 Inspection. Attach personal travel 5-8 charge to CC Inspection
3 Trip to France.

4 I would say that at face I don't see a problem with
5 it, but I would certainly need more information before I make
6 that determination.

7 Q So you haven't had time to go through and look at this in
8 detail or get -- you haven't seen any backup for any of this,
9 have you.

10 A No. I'd like -- yeah, I'd like to see -- I have not seen
11 backup. I'd like to see it. I'd like to hear what the
12 explanation is for the travel along with the backup and then be
13 able to make a determination.

14 Q Okay. So at this point, based upon your limited review,
15 do you have any opinion as to whether these expenses should be
16 considered income to Mr. Hee?

17 MR. HARRINGTON: Objection, Your Honor. Foundation.
18 He just said he hasn't had any time to review it.

19 MR. TOSCHER: Limited. As a practical matter, how
20 could he ever review this just getting the schedule yesterday,
21 Your Honor?

22 THE COURT: So the question is you want to know if he
23 has an opinion.

24 MR. TOSCHER: I'll rephrase.

25 THE COURT: Okay.

1 BY MR. TOSCHER:

2 Q In reviewing it, is there anything in the schedule which
3 suggests to you that these amounts should be income to Mr. Hee?

4 A There are so many items and they are very, very small,
5 some of them \$30 or less. I can't tell. On face value what
6 I'm reading, they appear that they could be business. I would
7 want to have more information.

8 Q Fair.

9 Now, of all the claimed government assertions of
10 nondeductibility regarding the corporation or income to
11 Mr. Hee, I think based upon what we talked about before that
12 the only two items that you felt were nondeductible were the
13 MIT tuition, one; correct?

14 A Correct.

15 Q That was in 2004 for approximately \$34,000?

16 A Correct.

17 Q And your conclusion, after your forensic analysis, is that
18 that was an error on behalf of the accountants; is that
19 correct?

20 A That's correct.

21 Q And the other item that was in your chart regarding
22 payments to Diane Doll, you felt that there should be further
23 analysis regarding who the benefits were provided to, whether
24 it was incidental, to make that determination; correct?

25 A Correct.

1 Q And you also concluded with respect to those there was an
2 error by the accountant, or a failure by the accountant, to
3 properly inquire as to those; is that correct?

4 A That's correct.

5 Q So it's fair to say, Mr. Howard, the only two -- after
6 reviewing all this information the only two -- there's only two
7 adjustments that you would agree with with the government.
8 That's the MIT tuition; correct?

9 A Correct.

10 Q And the Diane Doll.

11 A Correct.

12 Q And you believe both of those were errors by the
13 accountant.

14 A That's correct.

15 MR. TOSCHER: I have no further questions, Your
16 Honor.

17 THE COURT: Okay. Cross-examination.

18 CROSS-EXAMINATION

19 BY MR. HARRINGTON:

20 Q Good afternoon, Mr. Howard.

21 A Good afternoon.

22 Q So you testified that you did a forensic accounting of the
23 treatment of expenses in this case?

24 A Forensic analysis.

25 Q Forensic analysis. And that involves drilling down and

1 tearing through all the books and records. And you talked
2 about that process?

3 A I think that is an overstatement. Forensic analysis is
4 subject to my -- what I felt was necessary to come to the
5 conclusions that I drew in my opinion. I didn't tear books
6 apart and --

7 Q Okay. You used the phrase "drilling down" several times?

8 A Yes.

9 Q And was that process -- that process would be more
10 detailed than what an ordinary tax return preparer would do,
11 isn't it?

12 A That's correct.

13 Q And are you being compensated for your testimony today?

14 A I am.

15 Q And how much are you being compensated?

16 A I'm getting compensated \$350 per hour.

17 Q And how many hours have you put into this?

18 A Probably close to 150 or 200 hours.

19 Q And have you been paid yet?

20 A Yes. For -- partially, yes.

21 Q And are you going to submit an invoice for the payment?

22 A Yes.

23 Q Now, let's be clear about a couple things. The payments
24 to Diane Doll were deducted as business expenses by Waimana;
25 right?

1 A Correct.

2 Q And you agree that that wasn't a proper business
3 deduction.

4 A Correct.

5 Q And the payments to MIT were also deducted as a business
6 expense, and you agree that those were not a proper business
7 deduction; right?

8 A Correct.

9 Q Okay. In looking at the Diane Doll payments, if we could
10 turn to page 10 in your book, I think you referred to a 2002
11 memo; is that right? Or excuse me, a 2003 memo about the 2002
12 tax information.

13 A Yes.

14 Q And so if you look on either side of that page, the
15 payments are dated 2003. Do you see that?

16 A Yes.

17 Q So the memo at page 10 wasn't what was used to
18 characterize the payments in 2003?

19 A Not sure.

20 Q Okay. Now, you also testified that in looking through the
21 Diane Doll records, it was your determination that the
22 accountants made an error?

23 A Yes.

24 Q And you said you thought that the accountants were the
25 ones who were classifying expenses?

1 A Correct.

2 Q Now, were you aware that Nancy Henderson testified that
3 Albert Hee directed her to classify those expenses as
4 consulting fees?

5 MR. TOSCHER: Objection, Your Honor.
6 Mischaracterization.

7 THE COURT: Well, I remember her saying that she sat
8 down with Mr. Hee. Overruled.

9 THE WITNESS: The answer is, no, I wasn't aware of
10 it. But I, however, would say that a client sitting with their
11 assistant going through deductions and classifying them, those
12 deductions still came to the attention at least in 2003 by the
13 accountants, and further inquiry should have been done by
14 them.

15 BY MR. HARRINGTON:

16 Q Okay. But you weren't aware that Albert Hee is the one
17 who directed that it be deducted as a consulting fee. You
18 weren't aware of that?

19 A I don't know who directed it to be a consulting fee. I
20 only have the information I have here.

21 Q Okay. So you didn't hear any of the testimony in this
22 case?

23 A No.

24 Q Okay. So you also weren't aware that Lynn Tamanaha at
25 Chinaka & Siu also testified that the various business expenses

1 were already categorized by the time those records came to her
2 firm?

3 A She may have testified that, but the information that I
4 reviewed appear that they weren't.

5 Q Okay. That's what you saw from the papers, but her
6 testimony was the opposite. Are you aware of that?

7 A I haven't -- I didn't pay any attention. I rely on
8 written documents. They tend to document the past better than
9 people's memories.

10 Q So you haven't reviewed any of the testimony in this case.

11 A I've read depositions, but I don't remember specifically
12 what you're stating there.

13 Q Depositions --

14 A I misspoke. Court testimony.

15 Q Okay. Thank you.

16 So you also weren't aware then that Mr. Chinaka
17 testified as well that the expenses were already categorized by
18 Waimana when they came to his firm.

19 A I don't recall that, no.

20 Q And turning to the MIT expenses, I assume you also weren't
21 aware that Nancy Henderson testified that Albert Hee told her
22 to classify those payments as educational expenses.

23 A What I would state to that is I have --

24 Q Could you please answer the question first. Were you
25 aware that that was her testimony?

1 A No.

2 Q Now, you talked a little bit about the returns being filed
3 close to the deadline by Chinaka & Siu and by KMH, LLP; do you
4 remember that testimony?

5 A Yes.

6 Q And so were you aware that the testimony from the folks at
7 KMH was that they were getting all the information from Waimana
8 at the very last second? Were you aware of that testimony?

9 A That would further my opinion that things were being
10 extremely rushed and not enough time to pay attention to
11 detail.

12 Q And you'd agree that the taxpayer has a responsibility to
13 timely provide information to an accountant; right?

14 A I would agree with that, but I also would answer with the
15 fact that whoever's responsibility it is, if things are rushed,
16 things can be -- accounting can be prepared incorrectly.

17 Q Sure. And the rush could be responsible -- the
18 responsibility of the client for providing information too
19 late; right?

20 A Could be.

21 Q And we talked a little bit about the house in Santa Clara?

22 A Yes.

23 Q And I think you said you were aware that defendant's two
24 children lived in that property?

25 A Yes.

1 Q Now, were you aware that nine other college students lived
2 with his children?

3 A Yes.

4 Q And so correct me if I'm wrong, but having 11 college
5 students might not be the best way to take care of an
6 investment property, would it?

7 A Maybe not, maybe so.

8 Q And are you also aware that the accountants weren't told
9 what -- the accountants at Chinaka & Siu and at KMH were not
10 told initially what the property was being used for?

11 A I'm not aware of that. I don't know if that would change
12 my opinion.

13 Q Okay. And so you're not aware that the folks at KMH
14 testified that they found out in 2012 about how the property is
15 actually being used and had to perform computations to change
16 the treatment? You're not aware of any of that?

17 A I'm aware -- I saw the computations in my forensic
18 analysis. However, my opinion was due -- in light of the
19 situation that brings us here all day could have had an impact
20 of why the property's classification was changed.

21 Q Now, would you agree that Mr. Hee was obtaining a benefit
22 from the use of the property by having his children live there
23 rent-free?

24 A Why is it Mr. Hee's benefit? I would call it the children
25 receiving a benefit.

1 Q Well, we saw the loan to shareholder record, and there
2 were many payments that Mr. Hee was paying for his children to
3 live on the mainland, and he didn't have to pay that anymore
4 once they lived in the house. Would you agree with that?

5 A I could agree with that. I don't know whose benefit it
6 was. It's not clear.

7 Q And I wanted to look at the dollar figures on page 37.
8 I'm sorry, it's not dollar figures. I guess it's percentages.
9 And if you look at page 37, you've created a pie chart. So
10 what's the actual dollar figure for .39 percent?

11 A In my testimony I said the dollar figure was or is
12 1,941,950 over a 10-year period.

13 Q Now, you may not have reviewed the testimony, but the
14 jury's heard that the government's calculations are slightly
15 higher. Would you agree with that? About 2.4 million?

16 A I think a lot of the government's -- "higher," meaning I
17 think that may be from the shareholder loan issue. I'm not
18 sure.

19 Q Okay. But there's just a difference in numbers there.
20 But in calculating .39 percent, you used a different number
21 than what the government did?

22 A I believe we used the number that -- from your exhibit
23 that came out a day ago. I'm not sure.

24 Q Okay. And so .39 percent represents about \$2 million,
25 though.

1 A Correct.

2 Q And I guess this chart is illustrating that it's a small
3 percentage of the expenses. Would you agree that that would be
4 a good way to hide what you're doing with certain payments?

5 A I wouldn't call it a good way to hide anything. It's just
6 a fact. It's a statistical fact.

7 Q Sure. And it may not appear at first blush; right? If
8 it's that small of a percentage, you may not notice it.

9 A I can't get there with that question.

10 Q Now I want to turn your attention to the ATM receipts
11 briefly.

12 A Yes.

13 Q And I believe that's on page 33. And I think your
14 testimony was that you -- on surface value you didn't really
15 see -- I mean, hold on. Let me rephrase that.

16 You thought that these could be a justifiable
17 business deduction. Would that be accurate for what your
18 testimony was on the ATM?

19 A Yes.

20 Q So I want to direct your attention to 4-61, which is maybe
21 about a third of the way of the page down. And it has a travel
22 date ending on March 11th. Do you see that? On the dates of
23 the trip?

24 A Yes.

25 Q And so then there's withdrawals dated March 22d or March

1 24th totaling about a thousand dollars. Do you see that?

2 A Yes.

3 Q So that would be after the trip took place?

4 A Could have been. I don't know.

5 Q Now, we talked a little bit about the wages that were paid
6 to the children. Were you aware that Mr. Siu actually
7 testified that he told defendant that the children needed to
8 work in order to earn a salary?

9 A I'm not aware that that was his specific testimony, but
10 that would be one opinion, yes.

11 Q Okay.

12 A I'm not going to disagree with that as a possible
13 variable.

14 Q So you weren't aware that that advice was given to
15 defendant?

16 A No.

17 MR. HARRINGTON: Just one moment, Your Honor.

18 No further questions, Your Honor.

19 THE COURT: Okay.

20 MR. TOSCHER: No questions, Your Honor.

21 THE COURT: All right. Then the witness is excused.
22 You may step down and leave the courtroom.

23 (Witness excused.)

24 THE COURT: Who's your next witness?

25 MR. TOSCHER: Morgan Banks.

1 MR. TONG: Your Honor, may we have a sidebar before
2 she testifies?

3 THE COURT: All right.

4 (At sidebar on the record:)

5 MR. TONG: Your Honor, I would like an offer of proof
6 on this witness because, from what he briefly described this
7 morning, I think her testimony is entirely irrelevant and
8 should be excluded under 403.

9 MR. TOSCHER: Okay. I'm happy to do that.

10 What I told Mr. Tong this morning, Morgan Banks was a
11 former employee of the Internal Revenue Service. She ran the
12 San Jose Fitness Center, which was a roll-out program by the
13 IRS, I believe, in 1989 designed to provide fitness and massage
14 services. It was part of the overall fitness program. And she
15 was there for four years. They rolled the program out to --
16 she was a test, but they rolled it all out for the purpose of
17 providing health and welfare benefits to the employees. This
18 goes right to the heart of ordinary and necessary, common,
19 accepted, and the IRS is doing it for their own employees.

20 THE COURT: Was it offering it to everyone?

21 MR. TOSCHER: It was offering it to everyone. It was
22 a facility. They built the facility for the employees. And
23 it's different, and I think the government has a technical
24 argument here, you know. Oh, please. That's not appropriate
25 to smirk at me.

1 MR. TONG: I'm not smirking. I'm smiling.

2 THE COURT: Okay. Okay.

3 MR. TOSCHER: And what the Court is talking about,
4 that's an appropriate subject of cross-examination. But the
5 government's challenging "Nobody does this." You heard it.
6 And we're entitled to put it on.

7 MR. TONG: First off, we never said nobody does this.
8 There's no evidence that Waimana had any kind of program which
9 would offer massages to employees across the board; so we're
10 talking apples and oranges. And the fact that the IRS may have
11 paid, with its own funds, to provide services to employees at
12 some other location is not relevant to whether or not his
13 deduction of not consulting fees, massage therapy payments,
14 were deductible under the Internal Revenue Code, I mean, it's
15 apples and oranges. It's 403.

16 He's trying to get in the fact because he wants to
17 say the IRS recognizes the value of the services, but it's a
18 different program. IRS is not a tax-paying entity either; so
19 they're not deducting those expenses as ordinary and necessary
20 business expenses.

21 Finally, more fundamentally, we have no evidence
22 whatsoever that the defendant knew about any other programs and
23 their deductibility at the time that he was deducting these
24 Diane Doll payments as consulting fees. So it's irrelevant,
25 403, and it can't be relevant to his state of mind unless --

1 unless and until he testifies.

2 MR. TOSCHER: I respectfully disagree. This gets to
3 the government's primary attack that it wasn't ordinary and
4 necessary and it wasn't common, and that's an important
5 threshold question that we're entitled to provide evidence on.
6 And the government doesn't want to hear it because the IRS were
7 being hypocrites. That's what they're saying.

8 This was happening. It was Corporate America
9 recognized it. You will hear testimony that the reason the
10 national office rolled out this program was because all of
11 Corporate America was doing it. And this was -- in all
12 fairness, Your Honor, this was the fitness facility, and
13 massage was just a part of it. Okay. And I'm going -- go
14 ahead.

15 THE COURT: Did Mr. Hee know about this?

16 MR. TOSCHER: Nobody knew about it, Your Honor, until
17 the *Wall Street Journal* found out about it.

18 THE COURT: Okay. So did Mr. Hee read the *Wall*
19 *Street Journal*?

20 MR. TOSCHER: No. I'm not going to proffer that, no,
21 Your Honor. But that had -- there's two components here.
22 There's whether it's ordinary and necessary. Then even if it's
23 ordinary and necessary, is it some sort of taxable fringe
24 benefit? And then it gets to, you know, what is the common
25 understanding? It's going on. Whether he knew about it or

1 not, it's part -- it supports his good-faith belief that he
2 wasn't doing anything wrong.

3 THE COURT: But if he didn't know about it, I don't
4 see how it could support his belief. Plus, I don't have
5 evidence of his belief; so --

6 MR. TOSCHER: Doesn't --

7 THE COURT: To the extent you're bolstering it, it's
8 kind of just sitting out there.

9 MR. TOSCHER: It's all the basic facts and
10 circumstances. And this -- we're going to have expert
11 testimony on Tuesday. She's not an expert. She's a fact
12 witness on it. I think it goes -- even leaving aside state of
13 mind, it goes to the heart of whether something is ordinary and
14 necessary when other business entities are doing it. Now, you
15 can parse it and say the IRS is different. It's close enough,
16 Your Honor.

17 THE COURT: Okay. I'm having a hard time, though,
18 equating it to what's a deductible expense if this would never
19 be deductible because the IRS doesn't file an IRS tax return.
20 It may well be that you can get your expert to say all kinds of
21 things are common, ordinary expenses. I don't know why an
22 IRS -- I mean, I understand that they've attacked the Diane
23 Doll payments and deductions as just like really so obviously
24 improper, and you want to undermine them and say, "Hey, you
25 hypocrites."

1 MR. TOSCHER: I wouldn't say that, but they are.

2 THE COURT: "You had business -- your business paying
3 for these things." But since they're not a taxpayer, I am kind
4 of concerned about the 403 issue. There may be some other way,
5 but unless there's a better direct tie. If they were allowing
6 other businesses to do it and you want to talk about that,
7 that's one thing. But for them to do it when they're not a
8 taxpayer, you're just trying to make them look bad.

9 MR. TOSCHER: Not just.

10 THE COURT: And I don't see the relevance of that,
11 okay. First of all, IRS looks bad to everybody anyway; so, you
12 know, I don't think you need this but --

13 MR. TONG: I'm smiling at that comment, too; so let
14 the record reflect that.

15 MR. TOSCHER: You're just not mocking me this time.

16 THE COURT: They're not taxpayers. I guess that's a
17 lot of my concern. So I'm not going to let this person testify
18 about that. Was she going to testify about anything else?

19 MR. TOSCHER: Well, I think she would testify about
20 her role and her employment as to providing these services and
21 the benefits of massage and those services.

22 THE COURT: That's the same thing.

23 MR. TOSCHER: No, no, I'm just telling you. Where
24 she was doing it is, you know, I don't know how I'm going to be
25 able to keep that quiet.

1 So what I'd ask, Judge, so the Court is ruling that I
2 can't put her on.

3 THE COURT: Not for what's been identified so far.
4 That's why I'm asking is there something else.

5 MR. TOSCHER: Can I -- I think we're about to take
6 our break.

7 THE COURT: Yes. Okay. Let's take a break. And we
8 may need another discussion without the jury. Okay.

9 MR. TONG: Thank you, Your Honor.

10 (In open court on the record:)

11 THE COURT: We're close enough to when I said we're
12 going to take a break that we might as well take it instead of
13 making you folks sit here. So we'll come back in about 15
14 minutes, and then we'll go until 4:00.

15 (Jury excused.)

16 THE COURT: Okay. So counsel, how about we come back
17 in 10 minutes. We can resolve this one way or another. Then
18 the jury can come back in 15 minutes.

19 MR. TOSCHER: Thank you, Your Honor.

20 (Court recessed at 2:27 P.M., until 2:42 P.M.)

21 (In open court without the jury:)

22 THE COURT: Okay. What's happening with this next
23 witness?

24 MR. TOSCHER: Your Honor, we respectfully submit that
25 it goes to the question of whether it's ordinary, whether it's

1 common. The fact that it's a -- it is a -- the IRS is a
2 business entity. The fact that they don't file tax returns I
3 think really is beside our main point. And I think the
4 standard is substantially prejudicial. As the Court noted --

5 THE COURT: Okay. But when we talk about -- you
6 know, I clearly recall that Miss Mitsuyoshi did testify --

7 MR. TOSCHER: Right.

8 THE COURT: -- about what is an ordinary and common
9 expense for a business. But that was in the context of looking
10 at what could be deducted. And so when you're talking about
11 whether something that is not going to show up as a deduction
12 at all because it's not being done by a taxpayer, I don't know
13 that it goes to what is an ordinary and common business expense
14 that, therefore, can -- unless there's some other problem -- be
15 deducted. I mean, that's the leap that I'm -- it's not just
16 what's ordinary and common. The testimony in the government's
17 case in chief went to what can be properly deducted.

18 MR. TOSCHER: Right. And the starting point is
19 ordinary, and the starting point is common. And the fact
20 that --

21 THE COURT: Right. But it is for a tax-paying
22 business. I mean, in other words, you know, it just can't be
23 that whatever is ordinary and common, period, can come in. I
24 mean, it's probably the case that professional athletes go to
25 get massages all the time. That doesn't mean that I'm going to

1 let somebody come in and say such-and-such professional athlete
2 gets these massages and -- because that actually has nothing to
3 do with what is ordinary and common for Mr. Hee's business.

4 And that's sort of the same mind-set I have about
5 what is ordinary and common for a non-tax-paying government
6 entity. If this Court, for example, said all employees can go
7 to our free, you know, such-and-such thing, taxpayers might
8 grumble, but I don't know why that would be relevant to whether
9 a particular taxpayer's deduction of it should be deemed to be
10 appropriate under the "This is ordinary and common for
11 businesses" rubric. That's the concern I have.

12 MR. TOSCHER: I understand, Your Honor. I'm not
13 going to belabor the point any further.

14 THE COURT: Okay.

15 MR. TOSCHER: I don't see how I can -- I mean, we
16 could consider, and I'll have to spend some time. I mean, she
17 has some expert qualifications in the area, but we are bringing
18 Mr. Rockowitz in on Tuesday; so I don't -- I really can't
19 salvage her right now and do that in the interest --

20 THE COURT: Okay. Well, there may be a problem with
21 disclosures.

22 MR. TOSCHER: That's exactly right.

23 MR. TONG: There's an issue with the disclosure. And
24 with regard to the other expert -- what is his last name again?

25 MR. TOSCHER: Rockowitz.

1 MR. TONG: Rockowitz. We have the issue that the
2 Court flagged earlier, which is his testimony is largely
3 irrelevant, unless it goes to the state of mind of the
4 defendant. And there is no evidence of the state of mind of
5 the defendant; so I don't think he should be called to talk
6 about what the industry generally does if that was not part of
7 the mental state when the deductions were taken.

8 THE COURT: Okay. But you guys are ahead of me
9 now.

10 MR. TOSCHER: He's way ahead of me, too, every
11 opportunity he can get.

12 THE COURT: Who's the next witness?

13 MR. TOSCHER: Mr. Gil Tam.

14 THE COURT: Okay. So let's just go to that witness.
15 Okay.

16 (Jury enters.)

17 THE COURT: Mr. Toscher.

18 MR. TOSCHER: Your Honor, we would like to call Gil
19 Tam.

20 (Witness photographed.)

21 THE CLERK: Please raise your right hand.

22 (Witness sworn.)

23 THE CLERK: Thank you. Please be seated.

24 Please state your name and spell your last name.

25 THE WITNESS: My name is Gilbert Kwai Tun Tam. My

1 last name is Tam, T-a-m.

2 DIRECT EXAMINATION

3 BY MR. TOSCHER:

4 Q May it please the Court, ladies and gentlemen. Good
5 afternoon, Mr. Tam.

6 A Good afternoon.

7 Q Could you tell us just where you reside, without giving
8 the address.

9 A I live in Kaimuki.

10 Q Okay.

11 A I recently moved to Kaimuki. I was in 'Aiea prior to
12 that.

13 Q Okay. How long have you lived in Hawai'i, sir?

14 A Seventeen years growing up, 11 years college and service
15 in the Army, and back here 38 years. So 17 plus 38.

16 Q Okay. So you went to high school here?

17 A Yes, sir.

18 Q And what school did you go to?

19 A I went to Kamehameha.

20 Q All right. You remember the year you graduated?

21 A 1966.

22 Q Were you able to go to college?

23 A Yes, sir.

24 Q And where did you go?

25 A I went to the U.S. Military Academy at West Point,

1 graduated in 1970.

2 Q 1970. And did you get a -- what kind of a degree did you
3 get from West Point?

4 A In those years we had a bachelor's degree, no major.
5 However, it was heavy engineering.

6 Q Heavy engineering. Did you have any postcollege
7 education?

8 A Yes, sir. I have a Master's in Public Administration with
9 an emphasis on Human Resources from Pepperdine University,
10 graduated in 1977.

11 Q Any other postgraduate degrees?

12 A If you consider the Army Command and General Staff
13 College, I graduated in 1990.

14 Q After graduating from West Point, how long did you serve
15 in the Army?

16 A I served actively for seven years. And at that time I
17 wanted to come home. I wanted my children to come home, meet
18 their grandparents, great-grandparents. So I left in 1977 and
19 came home. So after seven years.

20 Q Can you tell us where you served and what functions you
21 did when you were with the Army.

22 A I was an infantryman, infantry officer, commissioned as a
23 second lieutenant in the infantry. Went through a lot of
24 schooling: infantry basic, airborne ranger, jump master. Went
25 to helicopter school, flew helicopters in the Army. Stationed

1 in Germany; Texas; Fort Rucker, Alabama; Korea; White Sands
2 Missile Range; and left after White Sands Missile Range.

3 Q After you left the Army and came back to Hawai'i, what was
4 your occupation?

5 A I was a banker. I went to work for Bank of Hawai'i.

6 Q And how long were you a banker with the Bank of Hawai'i?

7 A I spent five and a half years: from 1977 to 1983.

8 Q And can you tell us your title or titles and what you did
9 when you were with the Bank of Hawai'i?

10 A I was at the bank twice. So the first time I was kind of
11 a senior management trainee. I was 29 years old then. And I
12 was in their program for operations, but then moved into the HR
13 department as a staff development manager doing training and
14 development, recruiting a lot of the young people going into
15 management at Bank of Hawai'i. So I recruited management
16 trainees. I was also the employment manager for the bank
17 before leaving.

18 Q Okay. You mentioned HR department. What does "HR" stand
19 for?

20 A I'm sorry. It's Human Resources. In those days it was
21 still called Personnel.

22 Q And how long were you with the bank?

23 A Five and a half years; so 1977 to 1983.

24 Q What about -- where did you go after you left the bank?

25 A I went to the gas company.

1 Q And what did you do there?

2 A I was the propane division manager, the non-utility side
3 of the company -- of the gas company, and I managed the O'ahu
4 branch as well as the Moloka'i and Lana'i branches.

5 Q Okay. And how long did you hold that position for?

6 A I held it for about two years.

7 Q And after that?

8 A After that I went to Kamehameha Schools. I was hired as
9 the personnel director for the first five years and actually
10 sent in my resignation at that time. But then I was asked to
11 stay, and I handled the administration group for Kamehameha
12 Schools. So it did the administration for both the school and
13 in those days they called it the estate; so the business side
14 versus the education side.

15 Q And how long were those combined?

16 A 10 years.

17 Q 10 years. So that brings us up to 19 -- mid 1990s?

18 A 1994.

19 Q Okay. Close. Did you go to work after you left the
20 Kamehameha Schools?

21 A I went back to Bank of Hawai'i.

22 Q Okay.

23 A I was asked -- I actually talked to Larry Johnson. At
24 that time they were going through a management change. One of
25 the individuals that was departing, they had asked me to fill

1 that role, which was the director of governmental affairs.

2 Q Okay. It sounds like thus far in your employment you have
3 quite a bit of experience in personnel, Human Resources, and
4 managing employees. Other than the work experience, any other
5 courses or training that you can recall?

6 A Much of it was military-related. I was -- stayed in the
7 guard and also in the reserves. I retired after 25 years. But
8 a lot of schooling in just forums, sessions, seminars,
9 workshops having to do with HR governance, nonprofits. Spent a
10 lot of time working and helping out as much as I could in the
11 community.

12 Q Okay. And during the course of these various employment
13 endeavors you described, did you become familiar with types of
14 benefit packages to employees?

15 A Yes, sir.

16 Q Do you know Mr. Albert Hee?

17 A Yes, sir.

18 Q Can you identify him?

19 A Yes. That is Mr. Hee.

20 Q Okay. Can you tell us how you know Mr. Hee.

21 A Mr. Hee is a naval academy grad. I don't hold that
22 against him. But many of the graduates of all of the different
23 academies, we tend to get together. But I knew Albert as a
24 businessman. And from time to time we would just talk about
25 issues relative to Hawai'i, people, families.

1 Some of the things that he knew -- one of my passions
2 is to help native Hawaiians. Another is to help veterans,
3 especially disabled veterans. And a lot of our discussions
4 centered around those as well as family, as how do we take care
5 of family?

6 Q Did there come a time -- and this is -- did there come a
7 time when you started working for one of Mr. Hee's companies?

8 A Yes. It was after my second tour with Bank of Hawai'i
9 that -- Bank of Hawai'i was going through reorganizing itself.
10 We went from 3,000 staff down to 2,000. We actually eliminated
11 about a thousand jobs. And at that time I raised my hand and
12 volunteered as well just because I thought it was time for me
13 to move on.

14 And in my discussions with Albert, he said, you know,
15 why don't you come and help us. The things that I have done in
16 the past, we could probably use it as -- at that time it was
17 2000 -- let's see, it was 2000 that a lot of the programs that
18 he had envisioned were probably coming to fruition, and he felt
19 that it was time that we needed to bring staff on, look at
20 programs, and look at how we move forward -- how we'd like to
21 move forward with the company in building the network for
22 Hawaiian Homelands.

23 Q So prior to the -- I'm going to ask you some questions
24 when you started working. But could you describe -- you said
25 you had interactions with him and discussions. Where would

1 those occur? What types of meeting locations?

2 A We'd have lunch. I'd go to his office. He'd come to my
3 office. We'd play golf. These would be a lot of just informal
4 discussions. So different places.

5 Q And over what period of time was that before you joined
6 the company in 2000, I think you said?

7 A I'd say probably 10 to 15 years.

8 Q So Mr. Hee offered you a position at one of his companies?

9 A Yes.

10 Q And could you tell us what position you took?

11 A He offered me a position at Waimana Enterprises, Inc.
12 However, he indicated to me that I would be, through a
13 management agreement, work for Sandwich Isles Communications
14 because, basically, that's where all the people were going to
15 be. So that was in 2000.

16 Q So you were employed by Waimana, which -- do you
17 understand Waimana to be the parent company of Sandwich Isles?

18 A Yes, sir.

19 Q But you were rendering services, through a management
20 arrangement, to Sandwich Isles.

21 A Correct.

22 Q And that's because that's where the bulk of the employees
23 were?

24 A Yes.

25 Q And what was your position going to be? Title?

1 A Vice president and administration manager or vice
2 president for administration, essentially.

3 Q Vice president of administration.

4 A Yes.

5 Q Can you tell us starting what your duties were.

6 A Essentially, was to oversee what I consider to be the back
7 office: the human resource function. Part of it would be
8 policies, policies and procedures, putting together policies
9 for the company as well as for the HR or human resource
10 programs, putting together programs, training, a lot of benefit
11 as well as the salaried administration program out of the Human
12 Resources side.

13 Q How would you describe the mission of Waimana and Sandwich
14 Isles?

15 A The mission to me is noble. That we were going to be
16 building a state-of-the-art network to help native Hawaiians,
17 to connect up the Hawaiian Homelands. To me it was an
18 opportunity to allow native Hawaiians to get into the 21st
19 century, to be able to work from home, not only have -- in
20 areas that there are no infrastructure. When you look at
21 Hawaiian Homelands, where -- areas in the state where they have
22 no water, no power, no telephone. But what Albert did was put
23 telephones so that they could call. There are still areas
24 where -- in Hawai'i where they still have no power and they
25 have no water. They truck the water to their site. They have

1 generators. But he's put in the infrastructure for telephones
2 and internet.

3 Q So you said you joined the company in 2000. Could you
4 briefly describe how the company -- where it is today. Are
5 you -- excuse me, sorry.

6 Are you still with the company, Mr. Tam?

7 A No, I'm not. I left in 2011.

8 Q Okay. So you were there from 2000 to 2011?

9 A Correct.

10 Q Could you describe, since you were talking about the
11 build-out of the network, what occurred over that 10-year
12 period.

13 A A lot occurred. When you look at the program that Mr. Hee
14 put together -- and part of that was Hawaiian Homelands, one of
15 the smallest departments in the state and at that time before
16 they had the claims that -- monies that were -- came from
17 claims, they had the smallest budget. And I know back then at
18 that time the chair of Hawaiian Homelands had come to him to
19 ask about how do you help me build infrastructure at no cost to
20 the department and at no cost to the residents. And he looked
21 it up, and it was through the rural development program out of
22 the USDA where it's a program that would allow for the
23 build-out of infrastructure on the native Hawaiian or the
24 Hawaiian Homelands. And it's a program that is available to
25 anyone. You know, it was available to our phone company here,

1 but they chose not to use it to be able to get out to rural
2 areas to help rural residents in the State of Hawai'i.

3 So we went from getting the first, I think it was
4 something like \$27 million, to build out new communities, new
5 subdivisions, one of them being Waimanalo, putting in a central
6 office -- that's where you tie all of the switches together --
7 and to put all of the infrastructure underground. So he built
8 out all of these, I guess, new subdivisions in Hawaiian
9 Homelands on Oahu. And then the next phase was to go to the
10 neighbor islands, and that was about, if I remember correctly,
11 probably 40 million to build out other subdivisions on the
12 neighbor islands: Maui, Big Island, and Moloka'i.

13 Q Could you tell us, when you say "build out" the
14 infrastructure, what is actually being done?

15 MR. TONG: Your Honor, while interesting, I think
16 this is not relevant to the charges in the case.

17 THE COURT: Overruled.

18 THE WITNESS: It's, basically, providing phone
19 service to new residents of new subdivisions. So it's,
20 actually, laying the fiber and the copper to the different
21 residents, trenching and getting them the infrastructure that
22 they need so that they would be able to hook up and have
23 telephone and internet.

24 BY MR. TOSCHER:

25 Q Okay. So you described a number of build-outs on O'ahu

1 and the neighboring islands. Tell us the status of the
2 network, where it was, or the build-out when you left in 2011.
3 And if there's anything material between that that you want to
4 mention, that's fine, but --

5 A So the build-out, the first two were to take care of
6 subdivisions. And then the next piece, which was fairly large,
7 was to start to connect all of the Hawaiian Homeland properties
8 and within each island. And then before I left, Sandwich Isles
9 actually went and connected all of the islands undersea. So it
10 was underground to the point of where it could be launched off
11 of the island undersea to connect all of the Hawaiian Homeland
12 properties.

13 Q And do you know what company of Mr. Hee's company was
14 involved with building out the underseas cable?

15 A It was the company called ClearCom.

16 Q Were you employed with ClearCom at all?

17 A No, sir.

18 Q Did you have any management personnel activities regarding
19 ClearCom?

20 A No, sir.

21 Q Now, if you can, tell us what your duties were as vice
22 president of admini--- vice president of administration working
23 for Waimana and Sandwich Isles.

24 A Well, beyond the Human Resources and working on policies,
25 I also did community relations and community affairs. We

1 looked at how we can help the native Hawaiian communities. And
2 there were four areas -- I was the community affairs guy, and
3 there were four areas where, if you understand where native
4 Hawaiians are as a people, from health, where we have the
5 highest incidence of everything that's bad; to education scores
6 being the lowest; economic development; incarcerations. I
7 mean, all of these things that we've talked about over the
8 years. So we look at being able to help the native Hawaiian
9 communities in four areas: education, health care, economic
10 development, and cultural preservation. So those are areas
11 that we wanted to fund to be able to support and to be able to
12 help native Hawaiians.

13 Q Okay. As part of your duties as Human Resources or
14 personnel, were you familiar with the employment policies at
15 Waimana and Sandwich Isles?

16 A Yes, sir.

17 Q And were you familiar with the employee benefits that were
18 provided?

19 A Yes, sir.

20 Q Now, we're going to talk about during the period you were
21 there up to 2011. Could you describe what the employee
22 benefits were.

23 A The employee benefits -- Al gave me a lot of freedom to do
24 some designing, but I'd like to start with, I think, the salary
25 side because that's important with regard to his philosophy of

1 taking care of the rank and file but wanting to take monies in
2 such a way that people can live, but also take care of the back
3 end so that they don't have to worry about their benefits,
4 their medical, their retirement, those kinds of things.

5 So I think one of the things that for me growing up
6 in this business community of Corporate America, Corporate
7 Hawai'i where you take salaries and you add three percent, you
8 add five percent, you keep compounding, and benefits continue
9 or become exponential when you do these kinds of things with
10 salary. So one of the things that we talked about was, okay,
11 what if we just did base -- a base pay. And we looked at the
12 market, and we tried to understand where the market was so
13 that, if a seasoned worker did their job and did exactly what
14 they're supposed to do, what did the market pay? And that's
15 generally at the midpoint of a market survey. That's where we
16 wanted to get people to. But we wanted to make sure that they
17 get paid at such a level and they wouldn't move in their base
18 unless they got promoted.

19 So then we took monies to be able to say let's take
20 care of making sure that they keep up with the economy. So the
21 first thing he did was, okay, we're going to provide for a
22 cost-of-living adjustment, which is a lump sum at the end of
23 the year based upon what the economy did, CPI, Bureau of Labor
24 Statistics, a lot of things that we looked at. That was the
25 first thing.

1 Secondly, if we had more monies, we would look at the
2 401(k). One of the things that he wanted to make sure that
3 people took care of their retirement. And that's why it was a
4 very good program if we could afford it. Everything was
5 predicated on our ability to pay. So if we had monies, we
6 would announce at the beginning -- at the end of the year for
7 the next year what our match would be. And one of the programs
8 for the 401(k) is a hundred percent of the first 12 and a half
9 percent match, which is excellent. I mean, you're not going to
10 find that. Took care of long-term care. Took care of our
11 medical.

12 Let me give you an example. Companies, you're lucky
13 today if you're an employee and you're single you'll get
14 covered for your single, but everything else you're paying 50
15 whatever percentage. Before I left we were paying \$20, \$40,
16 \$60 for single, two-party, and family for medical. And for
17 dental it was two, four, six. And always the idea that it's
18 based upon the ability to pay. So if we couldn't afford it,
19 we'd have to do what everybody else does.

20 But the fact that he did what he did on the base
21 pay -- because we talked about it because when companies get
22 into tough straits and budgets become a problem, the first
23 thing that goes is the cost -- the most costly part of your
24 business, and it's people. And one of the things that Al
25 didn't want to do ever, if he could, was not to jettison people

1 when times are tough. And I think he's done a great job to do
2 that.

3 Q So starting in 2000 through 2011, when were those programs
4 implemented?

5 A I think it was 2003 that the 401(k) -- he had already had
6 a 401(k) program, but when I came on board, I did some
7 analysis, and the 401(k) was being administered on the
8 mainland, was also -- the investments were done on the
9 mainland. While the investments still were done on the
10 mainland, we brought it home and with another company so that
11 people were working with individuals who could sit down with
12 them, they can call them, and so forth. So from 2000, 2003, I
13 think, is when the 401(k) plan. But we had developed a lot of
14 programs within that time frame.

15 Q Within that period of time.

16 A Yes.

17 Q You mentioned long-term care. Could you describe that for
18 us a little bit.

19 A Long-term care, in Hawai'i it's tough. It's just -- I was
20 the caregiver for my mom for the last five years, primary. And
21 the cost is astronomical. We put in a program of long-term
22 care. It's a 10-year premium pay. That means that in 10
23 years, all of the premiums that we pay, after 10 years it's all
24 paid up. What Mr. Hee provided for was for staff member and
25 spouse or significant other.

1 One of the things that I always remember, I've always
2 been concerned, you know, because the spike of -- and sometimes
3 abuse or so when people actually leave. And if the monies
4 itself isn't put to productive use. But when you look at
5 long-term care, some providers only provide it, and then if you
6 leave, that's it; you don't get anything. So we made a change
7 to have another provider so that any monies in there, you would
8 have that benefit. But, essentially, the benefit was for 6,000
9 per month for five years with an escalation clause of five
10 percent per year. Which, you know, even 6,000, you know, it's
11 tough. So any kind of supplemental long-term-care funding that
12 you can provide for your family is great.

13 I left. And you have an option when you leave -- I
14 didn't have the 10 years; so it wasn't paid up. So I had an
15 option to continue, and I personally couldn't do it. But I had
16 asked the company if I could reduce my benefit and pay over the
17 life, which I am. So I went from a 6,000 down to a 3,000,
18 which was affordable for me over a lifetime; so --

19 Q Now, were all employees of Waimana eligible for all the
20 benefits you described?

21 A Yes, sir.

22 Q Now, were you aware as -- in your HR function that
23 Mr. Hee's wife was on salary?

24 A I was -- I knew she was on salary, and I also knew at
25 times the children were on salary, especially during the

1 summer. But again some of the things that we had talked about
2 over the years was to be able to --

3 THE COURT: Hold on.

4 MR. TONG: I object at this point, Your Honor.

5 THE COURT: Because now you're going beyond the
6 question. I need him to ask questions.

7 MR. TOSCHER: Yes, Your Honor.

8 Q The -- you're aware that the children were put on salary.

9 A Yes, sir.

10 Q And the -- did you have an understanding -- did you know
11 they were on salary when they were attending college on the
12 mainland?

13 A I did not know that.

14 Q Did you know -- did you have any understanding regarding
15 Mr. Hee's plans for the future of the company and the children?

16 THE COURT: Hold on.

17 MR. TONG: I object. That calls for a recitation of
18 a hearsay statement.

19 THE COURT: Sustained.

20 BY MR. TOSCHER:

21 Q Okay. Now, Mr. Tam, as part of your involvement with the
22 company in administering benefits, was there ever a time that
23 the company instituted a program regarding massages for their
24 employees?

25 A There was a time that I think I was the one that brought

1 it to Mr. Hee. We had a day. It was billed as a wellness day.
2 And there was several masseuse who volunteered their time at
3 fundraisers at golf tournaments. And when I met them, I
4 thought it would be something that would be good for the staff
5 as a morale boost. So they brought, like, three chairs, and I
6 think we paid them \$30 or something per hour. I recall being
7 able to do that, and people being able to -- staff being able
8 to come and get a 10-minute, 20-minute massage as part of that.

9 Some of the things that we wanted to do is a little
10 more in-depth, you know, like --

11 MR. TONG: Your Honor, I object to the narrative. It
12 goes beyond the scope of the question.

13 MR. TOSCHER: Your Honor, may I approach the witness?

14 THE COURT: You're going to give him an exhibit?

15 MR. TOSCHER: A document. Counsel have been given a
16 copy of the document.

17 THE COURT: Okay.

18 BY MR. TOSCHER:

19 Q Mr. Tam, will you please take a look at the document and
20 familiarize yourself with it.

21 Have you taken a look at the document, Mr. Tam?

22 A Yes, sir.

23 Q Do you recognize it?

24 A Yes. I recognize the invoice. It's to my attention.

25 THE COURT: Hold on. Hold on. It was just a yes or

1 no.

2 THE WITNESS: Okay.

3 THE COURT: Now he needs to ask a question.

4 BY MR. TOSCHER:

5 Q You recognize the invoice. Do you recognize the check
6 request?

7 A Yes, I do.

8 Q And there's another document called Vendor Payment
9 Authorization. Does that look familiar to you? It's the
10 second page.

11 A Yes, sir.

12 Q And the first page is a copy of a check.

13 A Yes.

14 Q Or a copy of evidence of a check being paid.

15 Do you recognize this package of documents as records
16 kept in the ordinary business of Sandwich Isles?

17 A Yes, sir.

18 Q The type of business documents you saw when you were
19 there?

20 A Yes.

21 MR. TOSCHER: Your Honor, I would offer 50-7.

22 MR. TONG: No objection.

23 THE COURT: Okay. 50-7 is received in evidence.

24 BY MR. TOSCHER:

25 Q Now, Mr. Tam, you were talking a little bit -- let me ask

1 you about -- this is an invoice for Island Wellness, Attention
2 Gil Tam. Tell us again what program you were trying to
3 implement and how this fit with the overall benefits program.

4 A One of the things that we wanted to be able to do is to
5 have health fair days and so forth. One of the things that was
6 a little difficult for me, sometimes when you try to get --
7 whether it's the insurance carrier, we used HMAA. But
8 sometimes it's a little more difficult just getting medical
9 support to come and do things for wellness, i.e., blood
10 pressure, weight, whatever. So this was one way of being able
11 to help with staff relief, you know, for a 10-minute
12 rejuvenation or whatever. So that was part of, I think, some
13 of the things that we wanted to do.

14 Q When you implemented this, did you seek anybody's
15 authorization or speak with anybody about it?

16 A I spoke to Al about being able to do this.

17 Q And what did you tell him?

18 A That, you know, it would be an opportunity for our staff
19 to not only experience this as one of the wellness components,
20 and then be able to allow people to come for 10 minutes or 20
21 minutes, whatever. And he approved it.

22 Q He did approve it.

23 A Yes, sir.

24 MR. TOSCHER: One second, Your Honor.

25 Q Mr. Tam, you talked about the benefit package for

1 employees of Waimana and SIC. Were you familiar with benefit
2 packages for other companies in Hawai'i?

3 A Yes, sir.

4 Q And how did SIC's and Waimana's package compare to other
5 companies that you were familiar with?

6 A They were high on the totem pole as to its -- the programs
7 that were there were very -- I would consider it to be high.
8 You get high, medium, and low. Most companies are between --
9 and you normally put your programs together as a statement of
10 your value. So when you look at the market, if you're
11 performing at the average, you should have your programs at the
12 average. If you're performing higher, that you should have it
13 a little higher as well.

14 Q You left the company in 2011?

15 A Yes, sir.

16 Q Could you tell us the circumstances of your leaving the
17 company.

18 A Mr. Hee, as part of, I guess, trying to help native
19 Hawaiians, Mr. Hee had seen different company -- native
20 Hawaiian organization companies that were -- that perhaps
21 needed help. He understood my background in administration in
22 a lot of those programs. And there were some native Hawaiian
23 organization companies. These are companies that are certified
24 as native Hawaiian organizations, small businesses. In the
25 case of several of them, they're small, disadvantaged

1 businesses.

2 We talked about perhaps one company that I could go
3 to to give them a hand with their administrative
4 infrastructure, and a second company we talked about they
5 needed the help. And that's where I moved: to a native
6 Hawaiian-owned organization, small, disadvantaged company, that
7 was working on defense contracts. And I've been there since
8 for five years, and most recently left on June 2d to create my
9 own company. But I moved to that company and helped them put
10 together the administrative infrastructure and to put together
11 their compensation and benefit programs.

12 Q Thank you, Mr. Tam.

13 MR. TOSCHER: No further questions, Your Honor.

14 THE COURT: Okay.

15 CROSS-EXAMINATION

16 BY MR. TONG:

17 Q Good afternoon, Mr. Tam.

18 A Good afternoon.

19 Q Just so we're clear, during your time at Waimana you had
20 nothing to do with the accounting department; is that correct?

21 A That's correct.

22 Q So you did not approve reimbursements; correct?

23 A It depends. If I was a supervisor and there were
24 reimbursements that came through people that reported to me, I
25 approved them.

1 Q And then after you approved them, they would go to the
2 next higher level; is that correct?

3 A Yes.

4 Q Ultimately, someone with ultimate authority would say,
5 yes, issue a check; correct?

6 A Yes.

7 Q And the person with ultimate authority within Waimana was
8 Mr. Hee; is that correct?

9 A Yes.

10 Q And he had an office manager or assistant named Nancy
11 Henderson; is that correct?

12 A That's correct.

13 Q When people needed approval, they typically would go to
14 Nancy Henderson and Al Hee; is that correct?

15 A We also had Bob Kihune, who was CEO of Sandwich Isles. So
16 depending upon if it's Sandwich Isles versus Waimana.

17 Q Okay. And Bob Kihune was actually the CEO of Sandwich
18 Isles; correct?

19 A Correct.

20 Q And when he needed his expenses approved, he would go to
21 Mr. Hee; is that correct?

22 A Correct.

23 Q Now, you mentioned that part of your job was to go through
24 a -- it sounded like a fairly thoughtful analysis of the market
25 conditions; is that correct?

1 A That's correct.

2 Q Both to determine what the market was paying people for
3 certain positions; correct?

4 A That's correct.

5 Q Because the goal was to compensate people fairly in a way
6 that was both generous but sustainable; is that correct?

7 A Correct.

8 Q And I believe you testified that you knew that Mr. Hee's
9 children had worked at times over the summers; is that correct?

10 A That's correct.

11 Q But you did not know that they had been placed on salary
12 while in college; correct?

13 A Right.

14 Q And I gather, since you didn't know, that Mr. Hee did not
15 consult with you in setting the terms of their employment, did
16 he.

17 A No. Actually --

18 Q That calls for a yes-or-no answer.

19 A Repeat the question, please.

20 Q He did not consult with you on the amount of their pay,
21 did he.

22 A No.

23 Q Now, you mentioned about this massage day at Waimana.
24 Remember that testimony?

25 A Yes, sir.

1 Q And if I understood you correctly, you said that it was
2 your idea to bring in a couple of massage therapists; correct?

3 A Yes, sir.

4 Q As a morale booster.

5 A Correct.

6 Q Let me to ask you to look at that document, which is
7 Defense Exhibit 50-7. And turn to the last page, if you would,
8 please.

9 Try to avoid seasickness.

10 THE COURT: Please.

11 BY MR. TONG:

12 Q Mr. Tam, can you see that document on the screen?

13 A Yes, sir.

14 Q That's the same event that you were talking about; is that
15 correct?

16 A Yes.

17 Q And I believe you had testified that you recognize the
18 bill partly because it was addressed to you; is that correct?

19 A Yes.

20 Q And so we're clear, the event occurred on October 20th of
21 2008; is that correct?

22 A Yes.

23 Q And, in essence, the company brought in representatives of
24 Island Wellness; is that right?

25 A Yes.

1 Q And there's a description of what the company was paying
2 for, is there not?

3 A Yes.

4 Q And that, essentially, was two therapists for three hours
5 each; correct?

6 A Yes.

7 Q And the rate of pay was \$30 per hour; correct?

8 A Correct.

9 Q And the services were as you described: massage therapy.
10 Right?

11 A Yes.

12 Q So the total payment was \$180; is that right?

13 A Correct.

14 Q Now, the document in front of you also has a check request
15 form, which I believe is the second page; is that correct?

16 A Yes.

17 Q I'm sorry. It's the third page. Let me see if I can
18 display that here.

19 Do you see that document there, Mr. Tam?

20 A Yes, I do.

21 Q And a couple of things. This is the company's request for
22 a check to pay for the massage therapy services; is that
23 correct?

24 A Yes.

25 Q And the purpose indicated was wellness day; is that right?

1 A Yes.

2 Q So this event took place over three hours on that one day;
3 is that correct?

4 A Yes.

5 Q And the idea was two therapists came in, and employees
6 could, basically, have 10-minute massages; is that correct?

7 A Yes.

8 Q They weren't two-hour massages for each employee, were
9 they?

10 A No.

11 Q I see you making a face.

12 A No.

13 Q It was more like 10 minutes --

14 A 10 minutes, yes.

15 Q And people could do that and take advantage of it as a
16 morale booster as you had said --

17 A Right.

18 Q -- is that correct?

19 And it appears on this section that it asks for the
20 address of the vendor. Do you see that?

21 A Yes.

22 Q And that's only if it's a new vendor; correct?

23 A Yes.

24 Q So the vendor providing the massage therapy was a new
25 vendor to Sandwich Isles Communications; is that correct?

1 A Yes.

2 Q And there never was a program at Sandwich Isles or Waimana
3 during your time there where all employees could go in and have
4 two-hour massages twice a week paid for by the company.

5 A No.

6 Q No such program existed.

7 A No.

8 MR. TONG: Thank you. I have nothing further.

9 RE-DIRECT EXAMINATION

10 BY MR. TOSCHER:

11 Q Mr. Tam, briefly. Why did you, as the member -- or
12 supervising HR, why did you propose to have a wellness day or a
13 massage therapy program? How does that -- why did you do that
14 for the employees?

15 A Because I think it's important from an HR standpoint that
16 you have opportunities for wellness. And again we were looking
17 to also do other things, to have providers come in, especially
18 if it's with an insurance carrier -- medical insurance carrier,
19 to come in and do these kind of things. Again, like I said,
20 blood pressure readings and so forth.

21 A lot of it, you know, I just wanted to kind of put
22 in people's minds that we need to take care of our staff, and
23 then turned over a lot of things over to HR as part of the
24 staff development or staff relations program and so forth.

25 Q Did you have an understanding how massage therapy helped

1 the employees?

2 MR. TONG: Well, I think that's beyond the scope of
3 cross-examination.

4 MR. TOSCHER: No. Sorry, Your Honor.

5 THE COURT: I think it is, too. Sustained.

6 MR. TOSCHER: Okay.

7 Q The -- okay. I guess I'm going to draw the same
8 objection, but I'm going to try because it was on direct.

9 THE COURT: I'm sorry? I didn't quite hear you.

10 MR. TOSCHER: I was talking to myself, Your Honor. I
11 apologize.

12 MR. TONG: He was saying I'm going to object before
13 he asks the question.

14 MR. TOSCHER: Right. I have to watch behind me and
15 watch the microphone.

16 THE COURT: You're hemmed in.

17 BY MR. TOSCHER:

18 Q Mr. Tam, did you ever have any discussions with Mr. Hee,
19 without talking about the discussions, but any discussions
20 regarding succession planning for his company?

21 MR. TONG: That's beyond the scope, Your Honor.

22 MR. TOSCHER: It's re-direct.

23 THE COURT: Sustained.

24 MR. TOSCHER: Sustained. Okay.

25 No further questions, Your Honor.

1 MR. TONG: Nothing further, Your Honor.

2 THE COURT: Okay. Then you can step down and leave
3 the courtroom. You're excused.

4 Did you have another one?

5 MR. TOSCHER: Your Honor, we couldn't get a
6 replacement and --

7 THE COURT: Okay. So happy 4th of July to the
8 jurors. I'll see you on Tuesday July 7 at nine o'clock. No
9 trial on Monday.

10 Okay. So Tuesday July 7, nine o'clock.

11 (Jury excused.)

12 THE COURT: Okay. We need to talk about the
13 schedule.

14 Okay. How much longer should I be anticipating the
15 evidence will go?

16 MR. TOSCHER: I think two days will do it, Your
17 Honor.

18 THE COURT: So you think you have witnesses lined up
19 for Tuesday and Wednesday.

20 MR. TOSCHER: It may spill over. I'm not really good
21 at estimating. I was pretty good today, off a little bit. I
22 think Tuesday. I will try to do it Tuesday, Wednesday. I will
23 let the Court better know if we're here back on Monday for
24 jury --

25 THE COURT: Well, okay. So that's another issue.

1 But if you go into Wednesday, if the government has a rebuttal
2 case and then we have instructions and closings, the jury might
3 get some time to deliberate on Friday, might not. But if it
4 doesn't, then there's a long break. Well, I mean, it would be
5 good if the case went to the jury so that even during that
6 break they can deliberate. We just have to wait and see.

7 Right now I'm still on for another criminal case with
8 a hearing on Tuesday -- I'm sorry, Monday afternoon, the 6th;
9 so I can't give you that time right now. I'm not really sure
10 how we should arrange this. I think we should just assume that
11 we have to stay after the jury goes home on the 7th, which is
12 Tuesday, for now. I don't know how flexible counsel is
13 because, if on Monday it turns out the afternoon is freed up,
14 can counsel then come to court to resolve jury instructions, or
15 is that not workable?

16 MR. TOSCHER: We're flexible, Your Honor.

17 THE COURT: Okay. That would be great.

18 What about you folks?

19 MR. TOSCHER: The administrator can just send us an
20 e-mail.

21 MR. TONG: We would be available, Your Honor.

22 THE COURT: So for now I can't schedule you for
23 Monday, but if it turns out I can, my preference would be to
24 resolve jury instructions Monday afternoon because I think you
25 folks have enough to do in the evenings when the jury goes home

1 without spending a couple hours with me. So I'll aim for that,
2 but it's really out of my control. I'm not party to whatever
3 is going on among the attorneys in that case that is now on my
4 calendar for Monday afternoon. Every time my courtroom manager
5 gets some notice that she has a telephone message, she gets all
6 excited, but so far the news has not been what she's been
7 waiting for. So we're still on in the other case, but whenever
8 we hear, we'll let you know.

9 Thank you very much. Have a good holiday.

10 MR. TONG: Your Honor, one last thing. I just want
11 to give the Court notice that I'm giving counsel notice that I
12 will object to the calling of the massage therapy expert,
13 unless the defendant testifies such that it becomes part of his
14 state of mind.

15 THE COURT: So this is the one that I so far have
16 excluded.

17 MR. TONG: Right.

18 MR. TOSCHER: No.

19 THE COURT: There's another person?

20 MR. TOSCHER: I'm sorry. I didn't mean to interrupt
21 you.

22 THE COURT: No, no, it's okay. I'm obviously
23 misinformed.

24 MR. TOSCHER: No, no. We filed --

25 THE COURT: Can you talk into a mike. I'm so

1 sorry.

2 MR. TOSCHER: We filed an expert or gave an expert
3 disclosure to the government a week or two ago for
4 Mr. Rockowitz, and he does work for a private company.

5 THE COURT: So that's the other person that you were
6 talking about.

7 MR. TOSCHER: That's correct, Your Honor.

8 THE COURT: Okay. Well, we'll --

9 MR. TONG: Your Honor, I wasn't asking for a ruling.
10 I just don't want to be in a position of looking like I'm
11 delaying things if Monday morning or Tuesday morning he calls
12 this individual, and then I object. I'm just giving him
13 notice --

14 MR. TOSCHER: Well, we plan -- I'm sorry.

15 MR. TONG: I'm sorry. Please.

16 MR. TOSCHER: No. I'm sorry. I interrupted you.
17 We're so polite interrupting each other.

18 THE COURT: Yes.

19 MR. TONG: I beg your pardon. You accused me of
20 smirking earlier; so --

21 THE COURT: So you're going to call somebody to say
22 that what?

23 MR. TOSCHER: Basically, Mr. Rockowitz has a business
24 which provides massage services to Corporate America. Okay.

25 THE COURT: So that for businesses --

1 MR. TOSCHER: Correct.

2 THE COURT: -- he routinely goes around and offers
3 massage services.

4 MR. TOSCHER: Right.

5 THE COURT: And you're offering this because you want
6 to establish that this is an ordinary --

7 MR. TOSCHER: Ordinary and necessary business
8 expense.

9 MR. TONG: I think the Court's familiar with my
10 argument. There's no evidence here that there was any similar
11 program in effect at Waimana or Sandwich Isles during the
12 relevant years. We've had Susan Mitsuyoshi testify as to the
13 requirement that there be a program available to all employees
14 as a fringe benefit in order for the company to deduct the
15 expense. There is no such evidence. So what different does it
16 make whether or not there are vendors out there in the
17 community that could provide that service when this company
18 never did? And, more fundamentally, there is no predicate for
19 it because, to the extent it goes to any good-faith
20 misunderstanding of the law, that would require that there be
21 evidence that the taxpayer, in this case the defendant, have
22 such a misunderstanding.

23 THE COURT: Okay. So with respect to his good-faith
24 belief issue, I need to understand: Is there a dispute about
25 whether massage therapy offered only to the shareholder is

1 deductible? Because if there is no such dispute, if everybody
2 is in agreement that, when it is offered to one person only
3 that it is not a deductible expense, then I don't see the
4 relevance of putting on evidence that, when it's offered to
5 employees in general, it can be deducted. So I first want to
6 understand whether there is or is not a dispute between the
7 parties about whether the Diane Doll sessions were
8 deductible.

9 MR. TOSCHER: I think there are -- the first question
10 is is it ordinary and necessary, and that's the first hurdle.
11 The government needs to establish it's not. And the second one
12 is how does it get treated as a fringe benefit. The
13 government's position is it has to be offered to everybody.
14 And there's an argument that it should be, but the first basic
15 is whether it's ordinary and necessary, whether it's common.

16 You had Susan Mitsuyoshi testify it's not common.
17 And that evidence needs to be rebutted, Your Honor. They can
18 argue that, well, even if it's ordinary and necessary, it was a
19 fringe not offered to everybody, and let them make that
20 technical argument to the jury. But with all due respect, Your
21 Honor, I think we're allowed to present contrary evidence to
22 Miss Mitsuyoshi.

23 THE COURT: Okay. And, you know, I don't necessarily
24 think that the defense is restricted to whether -- it certainly
25 would be helpful to the defense if, you know, it put on

1 evidence that Mr. Hee believed this, and in good faith. But
2 that can't be the only way to defend. I mean, if, in fact, it
3 could be deducted, then whether he believed it or not, I mean,
4 that would be a defense; right? I mean, this is a deductible
5 expense. So whether he believed it or not, if he deducted it
6 and it is deductible, that would be a defense to the charge.

7 MR. TONG: Their expert today said it was
8 nondeductible.

9 THE COURT: So how are you going to do that?

10 MR. TOSCHER: No, I don't think he -- I think he said
11 it had to be ordinary and necessary, and then you would
12 consider whether it was a taxable fringe or whether it was de
13 minimis.

14 Let me take a step back, Your Honor. I don't believe
15 we need to make a decision regarding Mr. Hee testifying to
16 present objective facts and evidence reflecting on willfulness
17 and good faith.

18 THE COURT: No, no, no. So -- I mean, that may be,
19 but quite apart from that, this evidence could go to whether
20 something was deductible, I think, is what you're saying.

21 MR. TOSCHER: That's correct.

22 THE COURT: And I don't think that we need to have
23 Mr. Hee's belief in evidence for you to put on your case that
24 this was, in fact, deductible. I mean, I don't know if you're
25 making that argument. It's still not clear to me whether

1 you're making that argument.

2 MR. TOSCHER: I understand it's complex. But I guess
3 the point is it's the government's burden to prove beyond a
4 reasonable doubt that he was not in good faith, that this was
5 willful and intentional acts, and these are highly relevant.

6 THE COURT: Okay. Well, I remember clearly that
7 Miss Mitsuyoshi did say that it didn't fit into that. She said
8 it's not common, it's not ordinary and necessary; so I don't
9 know why he doesn't get to rebut at least that part. So that's
10 my thought.

11 You folks can think about it over the weekend. And
12 maybe you can help me again when we meet with more wonderful
13 expositions of this topic, but right now I'm inclined to let
14 him do it.

15 MR. TOSCHER: Happy 4th of July, Your Honor.

16 THE COURT: Have a good 4th of July.

17 (Court adjourned at 3:53 P.M.)

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1 COURT REPORTER'S CERTIFICATE

2 I, Debra Kekuna Chun, Official Court Reporter, United
3 States District Court, District of Hawaii, do hereby certify
4 that pursuant to 28 U.S.C. §753 the foregoing is a complete,
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/s/ Debra Chun

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DEBRA KEKUNA CHUN

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RPR, CRR

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